UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MOLD MASTERS COMPANY

and

Cases 7–CA–48506
7–CA–48637

BRADLEY C. BAKKE, an Individual

And

STEPHANIE A. YAKES, an Individual

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JD–15–06
Lapeer, MI

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DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. These consolidated cases were heard by me on August 24–26, 2005, in Flint, Michigan, pursuant to original charges filed by two individuals, Bradley C. Bakke (Bakke) in Case 7–CA–48506 and Stephanie A. Yakes (Yakes) in Case 7–CA–48637 on April 14 and May 25, 2005, respectively, against the Mold Masters Company (the Respondent).

On June 2, 2005, the Regional Director for Region 7 of the National Labor Relations Board (the Board) issued a complaint against the Respondent alleging that it violated Section 8(a)(1) of the National Labor Relations Act (the Act) on a number of occasions covering the period April 5–April 7, 2005. On June 15, the Respondent timely filed its answer to the complaint, essentially denying the commission of any unfair labor practices.

On June 6, 2005, Yakes filed an amended charge against the Respondent in Case 7–CA–48637; Yakes filed her second amended charge against the Respondent on July 20, 2005.

On July 22, 2005, the Regional Director issued his order consolidating cases, consolidated amended complaint, and notice of hearing alleging that the Respondent on numerous occasions violated Section 8(a)(1) and (3) of the Act. On August 8, 2005, the Respondent timely filed a responsive answer to the consolidated amended complaint, again essentially denying the commission of any unfair labor practices.

At the hearing, the parties were represented by counsel and were afforded full opportunity to be heard, examine and cross-examine witnesses, and introduce evidence. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs by the General Counsel and the Respondent, I make the following findings of fact, conclusions of law, and order.

I. Jurisdiction—the Business of the Respondent

The Respondent maintains and operates an office and place of business in Lapeer, Michigan, and has been engaged in the manufacture and nonretail sale of plastic automobile parts. The Respondent admits that during 2004, in conducting its business operations, it earned gross revenue in excess of $500,000 and purchased and received at its Lapeer facility goods and materials valued in excess of $50,000 directly from points located outside the State of Michigan. Accordingly, I would find and conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organization

It is admitted by the parties, and I would so find and conclude that, at all material times, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practice Allegations

A. Background

1. Company organization and business operations

Founded in about 1973 by Hugo Leonardi, who currently serves as the Company's chief operating officer (and an admitted supervisor/agent), the Respondent engages in the business of manufacturing plastic injected molded parts for the automobile industry. The Respondent employs about 170 workers who are organized into four major production departments and an administrative office which, among other things, handles the Company's business resources, finances, and sales function.[1]

The four major departments include maintenance, molding, flocking, and paint departments.[2] Some of the 60-70 workers in the molding department operate single or two-man machines that create automobile parts (cells) through a process that utilizes plastic material injected into molds or "tools" which are provided to the Company by its customers. Other molding depart workers are employed as process technicians, materials handlers and die setters.

The flocking department workers (about 30 employees) apply a sprayed-on adhesive and nylon fiber to the finished part which is then heated in an oven. The paint department employees (around 15–20) paint the finished parts.

During the time pertinent to the instant case, Terri Britt, an admitted supervisor/agent, is the head manager of flocking, and Michael AuFrance, also an admitted supervisor/agent, heads

[1] See Jt. Exh. 9, the Mold Masters Organizational Chart which reflects the administrative functions and hierarchy of the Company during the period covered by the complaint.

[2] The Respondent's maintenance and paint departments, their personnel, managers, and any activities that may have taken place there not pertinent to the issues associated with this matter.

the molding department.[3] Reporting to AuFrance for the three shifts of the Company's operations are process technicians and other supervisors of the die setters, materials handlers, and machine operators working in the molding department.

Mold Masters supplies parts to automobile manufacturers either directly—tier one—or indirectly through other suppliers—tier two. The Respondent's customers supply it with the molds and dies from which the parts in question are cast through the aforementioned injection process. Accordingly, these molds and dies, generally called tools, belong to the customers. Occasionally, a supplier may decide to terminate its contract with the Respondent. In such a case, the supplier is said to "pull its tools," that is, take back its molds and dies. If this occurs, the Respondent is called on to produce a specified number of parts by the customer—to make a "bank" of parts as it were—prior to the pulling of the tools.

During its existence, the Respondent has experienced on a number of occasions a pulling of tools. Some time in early winter (around December 2004), the Respondent was notified of an intended tool removal by one of its major customers, Collins and Aikman, which had decided to withdraw its business from the Respondent and produce its parts in-house. The Collins and Aikman contract was a substantial part of the Respondent's business at the time.

2. Quality control at Mold Masters[4]

The Respondent's business relationship with its customers depends on its ability to make parts free from defects. If a defective part makes its way to a customer, the Company is notified, an explanation is required, and the corrective action must be undertaken; the Company also is debited for the defective part(s). Where there is more than one quality issue, Mold Masters may be placed on a "containment," a two-tiered phase process designed to correct the quality issues presented. In phase one of containment, every part in question must be physically inspected and certified to be defect-free. If, in spite of the phase one containment, defective parts still are shipped to the customer, the Company is obliged to contract with an outside company to certify that the parts are 100 percent good. This second phase entails the outside company's checking every part produced in the facility and certifying them.

The containment process can be very expensive, ranging from several hundred dollars to $30,000 for any part found to be defective. The Company must bear any costs associated with the containment, and there is no price adjustment with the affected customer. Accordingly, producing qualify points is a matter vital to the Respondent.[5] Employees involved in parts production are aware of the Company's concern for quality and know they must inspect and certify that the parts they have handled are good at their particular stage of production. For

[3] Britt has been employed by the Respondent for 18 or more years and admitted that she and Leonardi are romantically involved or "dating" during the times pertinent to the case. AuFrance has been with the Company since about June 2004.

[4] The Respondent called Angela Swiatkowski, its vice president of finance, to testify about quality control at the Company; her testimony in this regard is essentially unrebutted. In this section, I have credited her testimony regarding the Company's quality control system and the consequences to the Company where quality of the finished parts comes into question. I note that Swiatkowski is the daughter of Hugo Leonardi.

[5] The Respondent also is required to submit some new parts through what is called the GP-12 inspection process through which any given part goes through an inspection process formulated by the customer. If a defective part shows up in GP-12, the Company must renew the process which entails additional costs to be absorbed by the Company.

instance, a molding machine operator either in a one or two-man team must certify that her or their parts are defect free by affixing a sticker with her or their employee number thereon. Under this procedure, the Respondent also maintains not only quality control and but also employee accountability.

Regarding the latter point, at least since 2003, the Respondent has enforced its quality program by imposing discipline on employees who have either packed defective parts or otherwise improperly packaged them. The disciplines imposed have run the gamut of verbal and/or formal written warnings to suspension from 1–3 days; and in one case a termination for a repeat violation.[6]

3. Mold Masters work rules

The Respondent has had in force and effect written work rules since at least January 30, 2003, when it published and distributed to employees an employee handbook dealing with company policies and regulations.[7] The handbook (at pp. 8 and 10) covers rules for personal conduct, dividing infractions into Group I, II, and III offenses, which include leaving a workstation without authorization from a supervisor, repeated failure to swipe your card in and out, carelessness, or inattention to job duties (Group I); threatening, intimidating, coercing, or interfering with other employees at any time, refusal to obey orders, or failure to do job assignments (Group II); and sabotage or deliberate damage or destruction of property belonging to the Company (Group III).

The handbook (at p. 10) also provides in pertinent part the following rules governing solicitation and distribution activities of employees at its facility.

> Employees are prohibited from engaging in oral or written solicitation for any cause or any purpose during working time, and distribution of literature of any kind is prohibited during working time or in work areas.
>
> Working time includes the actual working time (excluding meal periods and paid break time) of both the employee doing the solicitation or distribution and the employee to whom it is directed. Work areas do not include the lunch area, parking lot or public sidewalks.

The handbook (at page 8) informs the employees that the rules governing personal/conduct will, where violations occur, operate as follows (in pertinent part):

> A first violation of Group I Offenses, without a record of violations, will generally result in a written warning. In more serious cases, Group II Offenses, employees will generally be assessed to disciplinary layoff. Group IV, repeated or accumulation of violations, shall result in discharge. This procedure is only a guideline for supervisors. The Company may also use other penalties ranging

[6] See R. Exhs. 3–10. The various disciplinary notices contained in these exhibits cover calendar 2003 through 2005.

[7] See Jt. Exh. 1, the current handbook in question. It should be noted that it seems based on the credible testimony of employee witnesses, for example Lorilynn Trowbridge, a current employee employed since 2002, that the Employer had work rules when she began her employment. I also note that Jt. Exh. 1 indicates the current rules were revised and reissued on January 30, 2003.

from warnings, transfer, demotion, suspension without pay, and discharge; disciplinary action may be initiated at the Company's discretion.

In Management's opinion, there can be no mechanical formula for establishing disciplinary action, but the following three important factors will generally be considered in all cases.

a) The seriousness of the offense.
b) The employee's past record.
c) The circumstances surrounding each particular case.

It should be borne in mind that any set of rules and regulations cannot be all-inclusive or apply in every situation which may occur. Accordingly, these rules are not intended to limit the cause for disciplinary action to only those set forth.

4. Union activity/employee meetings[8]

Sometime around December 2004, Charging Party Stephanie Yakes called the Union and spoke to Union Representatives John Cunningham and Carla Patterson in separate calls. Patterson, a union organizer, was assigned the lead responsibility for the organizing effort the Union planned for the Respondent's facility and later (in 2005) met with Yakes to discuss organizing the Company.

Patterson and five other unionists, including an organizer, Ray Cassabon, staged their first organizing effort on March 10, 2005, at the Respondent's facility. Patterson, Cassabon, and certain members of a UAW local divided themselves into two teams of three, positioned themselves at the two entrances of the Company's facility, and proceeded to distribute leaflets to the employees arriving for the first shift at around 6:15 a.m.,[9] as well as those departing from the second shift. Later that morning—around 7 a.m.—Leonardi arrived at the facility, and some verbal unpleasantness transpired between him and the organizers.[10] The police were called but no arrests, citation, or other action were taken by them.

On March 17, Patterson and three other union members (including Cassabon) returned to the Respondent's facility to hand out a leaflet announcing an informational meeting to be held

[8] In this section, I have generally credited the testimony of several witnesses called by the General Counsel, namely Charging Party Yakes, Union Representatives Carla Patterson and Ray Cassabon and former employee Ruth Czernawski. Each witness testified forthrightly and consistently and without obvious bias or animosity. Moreover, the occurrences of the events here related are not in serious dispute. I leave to further discussion the legal significance of these events, as well as my appraisal of these witnesses' testimony in areas other than those covered here.

[9] See G.C. 3, a copy of the combined leaflet and authorization card in question. Patterson and her group also leafleted at around 2:15–2:30 p.m. on March 10, so as to distribute to the second-shift employees.

[10] Patterson and Cassabon determined that the person they dealt with was Leonardi from the employees on the scene. Leonardi himself testified that he had a run-in with the union representatives on March 10. Leonardi admitted that he called or had the police called because he felt the union members were standing on his property, blocking the driveway, and harassing his workers.

with interested employees on March 19 at a local motel.[11] On March 19, the meeting took place as scheduled, but only a relatively small number of the Respondent's employees, including Yakes, attended. The Union convened about three to five meetings between March 19 and May 3 with the Company's employees, usually in the late afternoon and on a rather sporadic or last minute basis. On May 4, the Union again, but for the last time, leafleted the Respondent's facility exhorting the employees to sign on with the Union.[12] The Union has not resumed the organizational campaign at the Respondent's facility since May 4.

While the Union was organizing in its own right, a number of employees were privately talking among themselves about working conditions at the plant. Ultimately, a number of first-shift employees, including Yakes, scheduled an employees-only meeting for the Monday after Easter (March 28) at a public park near (within a mile and one-half of) the Respondent's facility where they discussed work-related concerns and attempted to devise a strategy to bring their concerns to management for redress without involving a third party, namely, the Union. About 13, perhaps as many as 20 employees, attended this meeting and the participants discussed various job-related issues, including health insurance, a 401(k), the management's treatment of employees, vacations, work incentives, and good performance days off to improve working conditions at the Company. No one from management or the Union attended this meeting which lasted about an hour or so.

B. Applicable Legal Principles

The complaint, as previously noted, alleges that the Respondent, through its agents and/or supervisors, violated Section 8(a) (1) and (3) of the Act on numerous occasions during the period March 24 through June 1, 2005. Before going into the substantive charges, it will be helpful first to discuss the legal principles applicable to these provisions of the Act.

1. 8(a)(1) principles

Section 7 of the Act (in pertinent part) provides that "[e]mployees shall have the right to self-organization, to form, join, or assist any labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities." Thus, in short, employees have statutory rights to, inter alia, support or oppose union representation, and in concert take action for better job conditions.

Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." The test under Section 8(a)(1) does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct, which it may be reasonably said, tends to interfere with the free exercise of employee rights under the

[11] See GC Exh. 4, a copy of the leaflet in question. It is noteworthy that the notice states that the Respondent's employees made an "overwhelming response" to the Union's initial organizing effort. Patterson testified that she received around 30 signed authorization cards from the March 10 effort.

[12] See GC Exh. 5, a copy of the leaflet handed out by Patterson and her team at 6:15 a.m. and 2:30 p.m. on May 4. It is noteworthy that this handbill informed the employees that, among other things, some of your coworkers have "disappeared," are you next, and exhorted them to protect their jobs by signing on with the Union.

Act. *Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.,* 305 NLRB 626 (1991); and *American Freightways Co.*, 124 NLRB 146, 147 (1959). Thus, it is violative of the Act for the employer or its supervisors and agents to engage in conduct, including speech, which is specifically intended to impede or discourage union involvement. *F. W. Woolworth Co.,* 310 NLRB 1197 (1993); *Williamhouse of California, Inc.,* 317 NLRB 699 (1995).

The test of whether a statement or conduct would reasonably tend to coerce is an objective one, requiring an assessment of all the surrounding circumstances in which the statement is made as the conduct occurs. *Electrical Workers Local 6 (San Francisco Electrical Contractors),* 318 NLRB 109 (1995). *Rossmore House*, 269 NLRB 1176 (1984). enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board has noted in this regard that the context of statements can supply meaning to the otherwise ambiguous or misleading expressions if considered in isolation. *Debbie Reynolds Hotel*, 332 NLRB 466 (2000).

In the interest of maintaining production and workplace discipline, employers can lawfully impose restrictions on workplace communications among employees and, in fact, when justified by such factors or considerations, employers can prohibit all talking while employees are working. *Stone & Webster Engineering Corp.,* 220 NLRB 905 (1975); *Pilot Freight Carriers, Inc.*, 265 NLRB 129, 133 (1982). Employers may also enforce valid no-solicitation rules even where the solicitations involve union matters. *Washington Fruit & Produce Co.,* 343 NLRB No. 125 (2004).

No-solicitation rules or policies are deemed unlawful if they unduly restrict the organizational activities of employees during periods and in places where these activities do not interfere with the employer's operations. *Our Way, Inc.,* 268 NLRB 394 (1983); *Laidlaw Transit, Inc.*, 315 NLRB 79, 82 (1994); cited in *Adtranz, ABB Daimler-Benz*, 331 NLRB 291 (2000). Therefore, a prohibition on communication among employees cannot be so overly broad that it prohibits communication among employees during paid nonwork periods such as breaks and lunch breaks or during the unpaid nonwork period such as before or after work, so long as the employees are lawfully on the employer's premises. Such broad prohibitions are presumptively invalid. *St. John's Hospital*, 222 NLRB 1150 (1976). Said another way, employers may lawfully ban worktime solicitations when defined as not to include before or after regular working hours, lunch breaks, and rest periods. *Sunland Construction Co.,* 309 NLRB 1224, 1238 (1992). However, without violating the Act, employers may remind employees of existing rules or established policies regarding solicitation. *Bryant & Stratton Business Institute v. NLRB,* 140 F.3d 169 (2d Cir. 1998).

The Board has also held that an employer may violate Section 8(a)(1) by orally implementing a rule prohibiting employees from discussing the union while on working time. *Stanadyne Automotive Corp.*, 345 NLRB No. 6 (2005). Notably a rule presumptively valid on its face may violate the Act if it is applied in a discriminatory fashion. *Opryland Hotel*, 323 NLRB 723 (1997); *Reno Hilton*, 320 NLRB 208 (1995).

With respect to an employer's maintenance of work rules, the question is whether the rule or rules in question reasonably tend to chill employees in the exercise of their Section 7 rights. The Board in such cases gives the rule a reasonable reading and refrains from reading particular phrases in isolation. *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (2004). The focus of the inquiry is whether the rule explicitly restricts activities protected by Section 7,

and a rule promulgated in response to union activity applied to restrict the exercise of Section 7 rights is unlawful.[13]

In *Jensen Enterprises*, Inc., 339 NLRB 877, 878 (2003) (citing *Willamette Industries,* 306 NLRB 1010, 1017 (1992), and *Orval Kent Food Co.,* 278 NLRB 402, 407 (1986), reiterating its position regarding employees talking in the workplace):

> [A]n employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with their work tasks. However, an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work, particularly when the prohibition is announced or enforced only in response to specific union activity in an organizational campaign.

In short, a rule restricting all talking or solicitation during working time that is uniformly enforced, but not promulgated in response to union activity, is presumptively valid. *Our Way, Inc.,* 268 NLRB 394 (1983).

Notably, employers violate the Act by threatening to retaliate against employees for engaging in union (or other protected activities). *Krystal Enterprises Inc.*, 345 NLRB No. 15 (2005). *Lee Builders, Inc.,* 345 NLRB No. 32 (2005).

The Board has repeatedly held that employers threatening employees even with unspecified reprisals for engaging in union or other concerted protected activities have a coercive effect on employees' Section 7 activity. *Ironwood Plastics, Inc.*, 345 NLRB No. 105 (2005); *United Scrap Metal, Inc.,* 344 NLRB No. 55 (2005). The Board in *Hialeah Hospital*[14] found an employer's statements to its employees that he felt betrayed and stabbed in the back because of their having contacted the union conveyed a message that the employees were disloyal, which implicitly threatened them with unspecified reprisals. Additionally, an employer who tells employees that their jobs would be negatively affected because of their engaging in union activities may violate the Act. *Washington Fruit & Produce Co.,* 343 NLRB No. 125 (2004).

Significant for the instant litigation, an employer who threatens employees with suspension for engaging in union activities has been found to have violated Section 8(a)(1). *Bestway Trucking*, 310 NLRB 651, 671 (1993); *Q-1 Motor Express*, 308 NLRB 1267, 1277 (1992).

An employer who surveils or creates the impression that it is surveilling the activities (union or protected concerted) of employees has been held to violate the Act. *Kentucky Tennessee Clay Co.,* 343 NLRB No. 102 (2004); *Avondale Industries*, 329 NLRB 1064 (1999). The Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the employer's statement (or conduct)

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[13] The violation in such case is dependent upon a showing of one the following:
(1) employees would reasonably construe the language to prohibit Section 7 activity;
(2) the rule was promulgated in response to union activity; or
(3) the rule has been applied to restrict the exercise of Section 7 rights. *Stanadyne Automotive*, slip op. at p. 3.

[14] 343 NLRB No. 52 (2004).

in question that her union activities had been placed under surveillance. *Tres Estrellas de Oro,* 329 NLRB 50, 51 (1999). As the Board stated in *Flexsteel Industries,* 311 NLRB 257 (1993), the idea behind finding "an impression of surveillance" as a violation of Section 8(a)(1) is that employees should be free to participate in union organizing campaigns without the fear that members of management are "peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." Said another way, the issue is whether the employer's behavior would reasonably suggest to the employee that there was close monitoring of the degree and extent of his organizational efforts and activities.[15]

The Board has intimated that where the evidence of surveillance is subject to inference that it came from general plant scuttlebutt or the grapevine or from employer monitoring or eavesdropping, there is no reason to infer the latter over the former. *SKD Jonesville Division L.P.*, 340 NLRB 101 (2003).

Regarding employer interrogations of employees, it is well established that interrogation of employees is not per se illegal. The Board has held that the test of the illegality of interrogation is whether, under all the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their rights. *Rossmore House*, 269 NLRB 1176 (1984). Under the totality of circumstances approach, the Board examines factors such as whether the interrogated employee is an open and active union supporter, the background of the interrogation, the nature of information sought, and the identity of the questioner. *Demco New York Co.,* 337 NLRB 850 (2002). Other factors to be considered about questioning of an employee include time, place, and personnel involved. *Blue Flash Express, Inc.,* 109 NLRB 591 (1954); *American Freightways Co.,* 124 NLRB 146, 147 (1959); and *NLRB v. Illinois Tools Works*, 153 F.2d 811 (7th Cir. 1946).

Thus, to avoid sanction, the employer is advised to inform the employee of the purpose of the questioning, assure him that no reprisals will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free of employer hostility to the union, must not exceed the necessity of the legitimate purpose by prying into other union matters eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege. *Johnnie's Poultry Co.,* 146 NLRB 770, 775 (1964), enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965), cited in *A.S.I., Inc.,* 333 NLRB 70, 72 (2001).

Notably, also, the Board has considered even arguably brief, casual, and not followed-up questioning violative of the Act if the words and context contain elements of coercion and interference. *Sea Breeze Health Care Center*, 331 NLRB 1131 (2000). In *Sea Breeze Health Care Center*, the Board underscored its decision by citing the observation of the Fifth Circuit in *NLRB v. Laredo Coca Cola Bottling Co.,* 613 F.2d 1338, 1342 fn. 7 (1980):

> [A]n employee is entitled to keep from his employer his views so that the employee may exercise a full and free choice on whether to select the Union or not, uninfluenced by the employer's knowledge or suspicions about those views and the possible reaction toward the employee that his views may stimulate in the employer. That the interrogation might be courteous and low keyed instead of boisterous, rude, and profane does not alter the

[15] *Bantek West Inc.*, 344 NLRB No. 110 (2005). *Desert Pines Gold Club*, 334 NLRB 265 (2001); *Promedica Health Systems*, 343 NLRB No. 131 (2004); *Cf. Register Guard,* 344 NLRB No. 150 (2005).

case. [Quoting from the underlying decision in *Laredo Coca Cola Bottling Co.,* 241 NLRB 167, 172 (1979)].

Lastly, Section 8(c) of the Act provides that:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

The Board has noted that Congress added Section 8(c) to the Act in 1947 as part of the Taft-Hartley Act because it believed that the Board has made it "excessively difficult for employers to engage in any form or noncoercive communications with employees regarding the merits of unionization."

2. 8(a)(3) principles

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.[16]

Preliminary to determining whether an employer has discriminated against an employee in violation of Section 8(a)(3) of the Act, the Board has held that the General Counsel must first make a prima facie showing sufficient to support the inference that the protected activity or activities of the employee was a motivating factor in the employer's decision to discipline or discharge the employee. *Rood Trucking Co.*, 342 NLRB No. 88 (2004).

If this is established, the burden then shifts to the employer to demonstrate that discipline or discharge would have occurred irrespective of whether the employee was engaged in protected activity. *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981); *Briar Crest Nursing Home,* 333 NLRB 935 (2001). It is also well settled, however, that when an employer's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the employer desires to conceal. The motive may be inferred from the total circumstances provided. Moreover, under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. *Fluor Daniel, Inc.,* 304 NLRB 970 (1991).

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge of that activity, animus, and adverse action against those involved, which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co.,* 303 NLRB 638, 349 (1991). Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, as noted even without direct evidence. Evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct,[17]

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[16] The protected activity includes not only union activities but also invocation and assertion of rights guaranteed employees under Sec. 7 of the Act. *NLRB v. City Disposal Systems,* 465 U.S. 822 (1984); *Interboro Contractors,* 157 NLRB 1295 (1966).

[17] The Board advises that the investigation should be full and fair. The Board has also noted, however, that while an employer's failure to conduct a full and fair investigation into alleged misconduct of an employee may constitute evidence of discriminatory intent, such failure will not always constitute evidence of such intent. *Hewlett Packard Co.,* 341 NLRB No.

Continued

departures from past practices, tolerance of behavior for which the alleged discriminatee was fired, disparate treatment of the discharged employees, and reassignments of union supporter from former duties isolating the employee, all support inferences of animus and discriminatory motivation. *Adco Electric*, 307 NLRB 1113, 1123 (1992), enfg. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.,* 305 NLRB 219 (1991); *Bryant & Cooper Steakhouse,* 304 NLRB 750 (1991); *Bourne Manor Extended Health Care Facility*, 332 NLRB 72 (2000); *Visador Co.,* 303 NLRB 1039, 1044 (1991); *In-Terminal Service Corp.,* 309 NLRB 23 (1992); *Nortech Waste,* 336 NLRB 554 (2001); *Bonta Catalog Group,* 342 NLRB No. 132 (2004); and *L.S.F. Transportation, Inc.*, 330 NLRB 1054 (2000).

Once the General Counsel has made a prima facie case, the burden shifts back to the employer to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of protected activity. That burden requires a respondent "to establish its *Wright Line* defense only by a preponderance of evidence." The respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. *Merillat Industries*, 307 NLRB 1301, 1303 (1992).

To establish an affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.,* 311 NLRB 1118, 1119 (1993), enfd. 99 F.3d 1139 (6th Cir. 1996).

Notably, the test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services,* 271 NLRB 1302 fn. 2 (1984). The Board has held that, "[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not, in fact, relied upon, thereby leaving intact the inference of wrongful motive." *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). In short, a finding of pretext defeats any attempt by the employer to show that it would have discharged the discriminatee absent his union activities. *Golden State Foods Corp.,* 340 NLRB 382 (2003).

The Board has determined that decisions affecting an employee's condition of employment may be based on its exercise of business judgment and that judges should not substitute their business judgment for that of an employer. *Lamar Advertising of Hartsford*, 343 NLRB No. 40 (2004); *Yellow Ambulance Service,* 342 NLRB No. 77 (2004).

Notably, the Board has recently held that discriminatory motive is not necessarily established by the failure to punish or presumably punish in a lesser or different way other employees as compared to the alleged discriminatee. Thus, a violation does not necessarily follow from inferences drawn from the ostensibly disparate disciplines of other employees and the alleged discriminatee. *Syracuse Scenery & Stage Lighting Co.,* 342 NLRB No. 65 (2004). In such circumstances, the Board would evidently accord the employer some leeway in the exercise of its business judgment and allow it to place more reliance on certain factors in the disciplinary process.

Moreover, the Board has emphasized that the crucial factor is not whether the business reason was good or bad, but whether it was honestly invoked and was in fact the cause of the action. *Framan Mechanical, Inc., 3*43 NLRB No. 53 (2004).

62 (2004).

Regarding the issue of animus, the Board advises that this issue should not be construed too narrowly, that is, focusing solely on the possible animus directed at one employee. Rather, the focus should be placed on animus to union activity on the employees' part of a more general nature. *K. W. Electric Inc.,* 342 NLRB No. 126 (2004).

The Board has recently opined that an employer's vigorous opposition to a union organizing campaign may not necessarily support an inference of animus. However, vigorous opposition combined with other unfair labor practices, direct evidence of an employer's negative attitude toward employees' support of the Union, as well as the pretextual nature of the asserted disciplinary rationale, are sufficient to support a charge of discrimination against an affected employee. *International Baking Co.,* 342 NLRB No. 12 fn. 1 (2004).

Significant for purposes of the instant litigation, it should be noted that the Board has held that an employer violates Section 8(a)(1) and (3) of the Act by issuing disciplinary warnings for the first time to employees for violations of its no-solicitation rule in the context of a union organizing campaign and in a manner disparate from past practices. *Clinton Electronics Corp.,* 332 NLRB 479 (2000); *6 West Limited Corp.,* 330 NLRB 527, 546 (2000). Additionally, where the employer has been lax in the enforcement of its no-solicitation/no-distribution rule, the Board has held that the employer cannot validly enforce those rules against employees engaged in union solicitations or distributions, and violates the Act in so doing. *Meijer, Inc.,* 318 NLRB 50, 57 (1995).[18]

C. The Substantive Charges

We turn now to the substantive charges.

1. The Stockman allegations

In paragraphs 11, 12(a) and (b), and 18, respectively, of the complaint, alleged agent/supervisor John Stockman is essentially charged with: on about March 24, informing Yakes that her job duties had been changed by management in retaliation for her protected concerted and union activities; on March 29, not only creating the impression among employees that their protected concerted and union activities were under surveillance by management, but also coercively interrogating employees about their knowledge of the employees engaging in protective concerted union activities, all in violation of Section 8(a)(1). Stockman is also charged with not allowing molding employees to work together because of their union and other protected activities in violation of Section 8(a)(3).

Yakes testified that she is currently employed by the Respondent as a materials handler, a job she has held for about 16-1/2 years, during which time she primarily worked on the first shift in the molding department. Yakes stated that her direct supervisor during 2004 through 2005 was John Stockman. Yakes stated that her main job duty as a materials handler is operating the hi-lo (forklift), transporting materials and finished parts, and loading the molding machines with material. According to Yakes, she also, as an ancillary part of her job duties, gave breaks to machine operators and, in fact, ran machines during operator breaks. Yakes stated that all materials handlers at the Company give breaks in this fashion.

[18] See also *Promedica Health Systems,* 343 NLRB No. 131 (2004).

Yakes stated that she was told by the manager of the molding department, Michael AuFrance,[19] around March 23 that she was no longer to give breaks to the molding machine operators, that she was simply to stay busy with her other duties. According to Yakes, she recalled also being told by a person whose name she could not recall, that she was not being allowed to communicate with other employees. However, on March 24, Yakes said that Stockman approached her at the end of her shift (around 3 p.m.) and asked whether she knew why she was, as he put it, being pulled off the floor (the production area). Yakes said that she responded that she did not know. According to Yakes, Stockman said that an (unidentified) employee from the third shift went to his/her foreman and informed that Yakes was the one who started the union activities then ongoing, and that word had gotten back to the owner (Leonardi) possibly through Bob Swiatkowski, vice president of manufacturing.[20] Yakes noted that this conversation occurred between just the two of them.

Yakes recalled that on about March 23, only a few days after the March 19 union meeting which she attended, and about a week before the Easter Monday employee meeting, she had approached two third-shift employees around 6:45 a.m. and informed them that the first-shift employees were planning to meet and discuss (without the Union) matters going on at the facility and devise a possible plan of action.

Yakes said that also on March 23, around 8 a.m., she had spoken with two first-shift operators, Ruth Czerniawski and Christine (LNU), about the meeting and queried them whether such a meeting would do any good. According to Yakes, Stockman joined this conversation in which she and the other two employees were also expressing their concerns about conditions at the facility. According to Yakes, Stockman stated that an employee meeting was worth pursuing with management.

Ruth Czerniawski testified that while employed by the Respondent, she was a first-shift machine operator in the molding department[21] where she said she was directly supervised by Stockman, whom she described as her foreman. Czerniawski stated that she became aware of the union organizing drive after observing union representatives standing on the sidewalk outside of the facility handing out fliers. Czerniawski said that she also attended the Easter Monday meeting of the employees.

According to Czerniawski, she often had conversations with Stockman who she said actually knew of her active involvement with the Union because she told him as much. However, Czerniawski said that she did not tell anyone else she considered a part of management of her support for the Union.

Czerniawski said that some time before the Easter Monday meeting, Stockman told her that management suspected that Yakes was the ringleader who called in the Union and that management was out to punish her for this. Czerniawski said that she tried to correct Stockman, telling him that Yakes was not the one who had called the Union. According to

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[19] As noted previously, AuFrance is an admitted supervisor/agent. Notably, AuFrance is the subject of a specific charge relating to alleged changes in Yakes' job duties. This matter will be discussed in a separate section of this decision.

[20] Bob Swiatkowski is married to Leonardi's daughter, Angela Swiatkowski.

[21] Czerniawski is no longer employed by the Respondent, having been laid off in June 2005. I note that the transcript indicates that she was laid off in 2004. This is either a mistake in transcription or a misstatement on her part. The context of her testimony indicates she was working for the Respondent in 2005.

Czerniawski, Stockman was also aware of her thoughts about having the employees speak to Leonardi, without union involvement to address and resolve employees concerns because she and a fellow worker, Christine (LNU), had spoken to him previously. Czerniawski said that Stockman said this approach could not hurt.[22]

Tonya Davis testified that she worked for the Respondent from July 22, 2002, until about May 11, 2005, when she quit. Davis said that she was a molding department machine operator working the first shift. She described Stockman as her "foreman."[23]

Davis said that she became aware of the start up of the union organizing drive about a couple of weeks before Easter 2005, observing at the time union representatives standing at the end of the Company's driveway entrances. Davis also stated that she was one of the employees who planned the Easter Monday meeting of the employees, noting that aside from the union's activities, impetus for this meeting came from management's having distributed some "papers" stating its views on the Union as well as offering to work with the employees directly to resolve their concerns as opposed to involving a third party—the Union.

Davis related that some time after the Union made its appearance at the facility, she and another employee (Roxanne Bakeman) were working on a two-person machine and asked Stockman, who happened to pass by, his views on the Union. Specifically they queried him as to what the benefits would be from having a union. According to Davis, Stockman said that based on his experience with another employer, he did not want a union. He explained that good workers who produced (like Davis and Bakeman) would derive no benefit from union representation; however, slackers and workers who frequently got into trouble do get a benefit.[24]

Davis stated that worked with Yakes for about 3 years. Davis said that while she did not know whether Yakes supported the Union, speculation was rife among the employees about her possible involvement. Davis noted that when she informed Stockman that she was quitting for another job, Stockman said "maybe you can get a job for Yakes because the way management was treating her was not right."

Stockman testified and generally simply denied making the statements attributed to him.

Stockman specifically denied telling Czerniawski that he suspected Yakes to be behind the union drive and, in fact, he did not think it was she.[25] Stockman also denied telling

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[22] Czerniawski said that this conversation took place before the Easter Monday meeting and Christine also participated in the discussion. Christine did not testify at the hearing.

[23] Davis said she assumed Stockman was a foreman but never knew his actual job title. She acknowledged no one had ever told her that he was officially a foreman.

[24] Bakeman did not testify at the hearing. Davis said she consulted with Stockman about unions because she had no experience working at a union shop, and she simply wanted his view. Davis stated she did not know whether he was ever a union member or even was a manager at a union shop. She did not ask and he did not tell.

[25] Stockman was examined by the Respondent's counsel as follows regarding the identity of the provocateur of the union involvement.

Q. The question was, did you ever tell Ms. Czerniawski that management suspected Stephanie was behind the Union?

A. No.

Q. Did you ever tell that to any employee?

Continued

Czerniawski or any other employee that management was in any way out to punish Yakes, and he heard no such sentiments from anyone in management.

Stockman denied telling Davis that she should try to get Yakes a job somewhere else, but admitted saying (presumably to Davis) "if you are not happy here, you need to get a job somewhere else." (Tr. 474.) Stockman also denied telling Davis that management was not treating Yakes well, stating that all employees were treated the same ("even") in the workplace.

Leonardi for his part testified and denied pulling Yakes "off the floor" for any union-related reason. Leonardi, in fact, stated that even as late as the hearing, he was unaware of the identity of the person who called the Union.

Davis also testified about another conversation she had with Stockman, this time in the context of the Easter Monday meeting of the employees. According to Davis, the day after the meeting (March 29), she was working at her machine while another employee (Marilyn Farnsworth) was helping to secure some boxes for her. Stockman came over and said that Leonardi knew about the meeting, knew what the employees discussed, as well who attended—basically Leonardi knew everything about the meeting.[26] Stockman then said that "if we [Davis and Farnsworth] could tell him who was there, he could help us out." Davis stated that she told Stockman that she attended the meeting but would not reveal the names of other workers who were there. According to Davis, Farnsworth[27] also said she would not give names. Stockman then said that he could not help them out. Davis said she told him then, "I guess you cannot," and the matter ended.[28]

Stockman conceded that employees did indeed approach him during the union campaign and solicit his views on the Union. Stockman noted that he used to work for a union company for about 18 years, but that he did not belong to any union and he thought it was for this reason employees sought his views.

Stockman denied telling any employees that the Company was watching individual employees or union meetings, noting, however, that employees told him that such activities were going on. Stockman also denied ever asking employees for the identities of those involved with the Union or any employee activity, saying he did not care about the matter. Stockman, in likewise, denied ever telling Davis that Leonardi knew that she had attended a union or employee meeting, but that employees did tell him they felt they were being watched by Leonardi. For his part, Stockman stated he did not know whether any surveillance was actually being undertaken by management.

A. No, because we didn't think it was Stephanie. We thought it was it was somebody else. (Emphasis supplied.)

I note at this juncture that these responses suggest that Stockman viewed himself as part of management, and, inferentially, that the Company's management evidently shared its thoughts and beliefs about who may have been involved with the Union among themselves.

[26] Czerniawski related that as she and the others who attended the Easter Monday meeting were preparing to leave, she saw Leonardi and Terri Britt twice drive by the park, about 5 minutes apart.

[27] Farnsworth did not testify at the hearing.

[28] Davis noted that Stockman also told her in this conversation that someone who attended the employee meeting told Leonardi what had transpired at the meeting, including what was said and who participated. (Tr. 294.)

Czerniawski also testified that before the union campaign, the molding department workers (on her shift) were paired together on the two-man machines. As a practical matter, according to Czerniawski, the routine was for one employee to "run the door" (presumably feeding material to the machine) and the other would handle the actual production of molded products; they would then switch roles every 1 to 2 hours.

Czerniawski said that this procedure changed after the Union started its organizing effort. In fact, as she recalled, this change occurred right after the Easter Monday meeting in the park. At that time, management ceased pairing molding department workers and instead paired molding workers with flocking department workers. Czerniawski stated that this had never been done before during her time with the Company.[29] Czerniawski said that she asked Stockman about the change. According to Czerniawski, Stockman said that he was not allowed to pair two molding department employees, because management did not want molding workers talking to each other.

Stockman did not directly address the statements regarding machine pairing attributed to him. However, according to Stockman, lots of employees were moved, as he put it, between positions during the Collins and Aikman tool pull-out in March and April, but this had no connection to union activity. Stockman denied telling anyone that molding employees were no longer allowed to work together. Stockman stated that, in fact, around this time two molding employees were assigned to work together on a two-person job.

The General Counsel contends first that Stockman is a statutory supervisor or, in the alternative, a statutory agent of the Respondent. She asserts that Stockman was a first-shift foreman directly supervising other molding department employees, that he was called supervisor[30] in company paperwork, and was indisputably placed in charge of the first-shift molding workers and reported to AuFrance. Moreover, she asserts, employees viewed Stockman as their supervisor, and he admitted under oath that he was a supervisor and included himself as a part of management, attending management meetings and relaying information back to the workers on his shift.

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[29] On cross-examination, Czerniawski said that she could not say whether the Company was concerned with completing the Collins and Aikman job in March-April 2005, but conceded that during this time she saw a lot of workers from other departments—flocking workers and materials handlers—operating molding machines. I note also that Davis testified that before the union effort, molding workers worked together but every once in a while, flocking workers were paired with molding employees, especially if the flocking department was slow and/or molding needed parts; two flocking workers even sometimes worked as a team.

However, after the Union's advent, Davis said management daily paired one flocking employee with a molding worker. Never were two molders paired at that time. Davis said this type of daily pairing never happened before.

Notably, Lorilynn Trowbridge, a current employee, testified that the Collins and Aikman job needed to be completed and the Company was especially busy during that time with employees brought in from other departments. Trowbridge stated that flocking department workers needed to be shown how to process this job and it made sense to keep a trained employee on the job. (Tr. 215.)

[30] The General Counsel concedes that Stockman was originally hired by the Company as a process technician. This is undisputed. However, she notes that when the former first-shift supervisor, Greg Graham, was let go in 2004, the Respondent placed Stockman in the position to assume Grahams' duties but did not evidently change Stockman's job description.

The General Counsel further asserts that former and present first-shift employees credibly testified that they referred to Stockman as "foreman" and went to him to correct machine problems. She concedes that while Stockman did some "hands on" work with the machines—setting up and starting them—the repairs were generally undertaken by two molding technicians supervised by Stockman.

The General Counsel also points out that the testimony of employees as well as that of Stockman himself undeniably shows that Stockman not only assigned work to employees on his shift but was directly involved with their evaluations. In the former instance, Stockman assigned workers the machines they were to work on daily and wrote their names on an assignment board. Moreover, Stockman was allowed to exercise his discretion in terms of assigning the best operators for any given job, assessing their skills in the process. She argues that Stockman also monitors the employees' work and ensures that they are attending to their assigned tasks and producing good parts. She notes that Stockman also is the person to whom employees on his shift turn to resolve various job problems, obtain supplies, and take permissible breaks.

Regarding employee evaluations, the General Counsel asserts that Stockman, while not being the final arbiter, consults with his supervisor, AuFrance, and provides substantial input for the reviews, as he is more familiar with the day-to-day performance of first-shift molding workers and his name appears as supervisor on an evaluation of a testifying former employee (Davis).

Finally, the General Counsel asserts that even if Stockman were not deemed a statutory supervisor, he possessed the apparent authority to satisfy the requirements of agency under the Act.

The Respondent argues that Stockman's official job title was process technician, a job that as evidenced by his company job description (Jt. Exh. 8) carries with it no supervisory authority.

The Respondent concedes that while Stockman had no hire-fire authority, he was vested with the authority to assign employees to machines in his department, but only by virtue of the departure of another employee. The Respondent also concedes that Stockman issued warnings to employees but only in consultation with his supervisor, AuFrance, who actually investigated these disciplinary matters independently. The Respondent likewise concedes that Stockman was also involved in the employees' appraisals but only to the extent that AuFrance went over them with him; only AuFrance officially issued the appraisals.

The Respondent asserts that Stockman's primary duties concerned the machines and the production process, including working hands-on with the machines. On balance, the Respondent argues that the General Counsel failed to carry her burden of proving that Stockman was a supervisor within the meaning of Section 2(11) of the Act.[31]

Turning to the substantive offenses involving Stockman, the General Counsel contends that the Respondent violated the Act by and through Stockman's telling Yakes on March 24 that she was being pulled off of the floor—not giving breaks—because she had been identified as the one responsible for starting a union and that Leonardi had gotten word of this. The General

[31] The Respondent did not proffer an argument or any discussion regarding Stockman's agency status under the Act, except in a caption in his brief (at p. 34) that asserted that Stockman was not a supervisor or agent of the Company.

Counsel asserts that Stockman's statement connected a negative employment action against Yakes with her having engaged in or thought to be engaged in union or other protected concerted activities. These statements by Stockman, she asserts, were unlawfully coercive and interfered with Yakes' Section 7 rights.

The Respondent essentially contends that inasmuch as Stockman is not a statutory supervisor, any of his purported statements or actions cannot be attributed to the Respondent. However, the Respondent further contends that Stockman credibly denied ever making the statements attributed to him. The Respondent submits that Yakes was less than credible because her memory was not good and she was contradicted by other witnesses on other matters.

The Respondent argues that even if, arguendo, the statements were made by Stockman, they were not coercive under the circumstances. It asserts that given Yakes' knowledge and understanding that materials handlers probably could or would be enlisted to help with the Collins and Aikman job, coupled with her and other workers' acceptance of Stockman as a non-threatening person, in fact a sympathetic and supportive person who enjoyed a good relationship with the first-shift workers, it is simply not reasonable to conclude that she was coerced or interfered with by him with respect to her Section 7 rights.[32]

Regarding Stockman's alleged creation of an impression of surveillance on March 29, the General Counsel contends that when he told various employees that the Company's management knew who attended the Easter Monday meeting, even what the participants said and, in fact, Leonardi himself knew "everything," these statements assuredly and reasonably could serve to discourage employees from engaging in union or other protected activities because upper management was watching them and would be able to detect their activities.

The Respondent, again asserting Stockman's nonsupervisory status, also contends that the statements attributed to him could not be reasonably assumed by employees that their activities were under surveillance by management. The Respondent argues essentially that simply being told that the Company learned (possibly) from other employees of a meeting, and that the employees had attended it and made some statements, is not sufficient to create an impression of surveillance. The Respondent notes that Stockman credibly denied not only making the statements but also engaging in any conversation covering this topic with any employee.

The Respondent finally contends that if Leonardi and Britt were seen driving by the park where the meeting took place—which both Britt and Leonardi denied—this was mere coincidence considering that the roadway in question was a major thoroughfare and the two, romantically involved as they were, were simply on an outing on a non-workday.

The General Counsel argues that Stockman also engaged in an unlawful interrogation on March 29 when he stated to employees that if they were to tell him who was at the Easter Monday meeting, he could help them out (with some of their issues).

The General Counsel maintains that Stockman's statements were unlawfully coercive in that the affected employees could reasonably believe, given the totality of the circumstances,

[32] Respondent also asserts that Leonardi's later statement to her that he was not upset with her remedied any possible coercive effect of Stockman's purported statements.

that future job benefits—the proffered help—or detriments could result, depending on their cooperation with Stockman's request for the names of employee meeting participants.

The Respondent argues that Stockman (again a nonsupervisory employee) credibly denied asking any employees who attended the employee meeting and that, considering all the circumstances, any such statement if made did not amount to an unlawful interrogation.

The General Counsel posits that when Stockman told Czerniawski on March 29 that he was not allowed to put two molding department workers together because management did not want them talking, this was done right after the Union came in and the day after the Easter Monday meeting. She also notes that after the union campaign, molding workers were again allowed to work with other molding workers.

The General Counsel submits that this action was taken by the Respondent because the focus of its attention was Yakes, whom she contends the Company suspected was the ringleader of the union movement and, therefore, the person with whom the Company did not want other molding workers talking. She further submits that the union animus underlying the move is evidenced by Leonardi's behavior with union organizers and Stockman's statement to Yakes regarding her being targeted for her activities. The General Counsel contends that the timing of the change in assignments coincides more with the union campaign as opposed to the Collins and Aikman job, which she submits was a mere pretext for the Company's illegal actions against its employees.

The Respondent asserts that its decision to pair molding and flocking department workers on two-person jobs was motivated solely by the Company's desire to match more experienced molding employees with the less experienced flocking employees to complete as expeditiously as possible the Collins and Aikman job. The Respondent argues that the Company's concern was to produce a large number of quality parts and its actions were to further that and, irrespective of any ongoing union activity, that it would have made this decision regardless of any union activity.

2. Discussions and conclusions of the Stockman allegations

Regarding the threshold issue of Stockman's statutory status, Section 2(3) of the Act defines "employee," and specifically excludes from that term "any individual employed as a supervisor." Under Section 2(11) of the Act:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Board has held that these functions are in the disjunctive and the indicia specified in Section 2 (11) are sufficient to confer supervisory status on an individual if the statutory authority is exercised with independent judgment and not in a routine manner. *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002); and *Allen Services Co.*, 314 NLRB 1060 (1994). See, e.g., *Health Care & Retirement Corp.*, 328 NLRB 1056 (1999); and *John N. Hansen Co.*, 293 NLRB 63, 64 (1989).

Notably, the job title "supervisor" in and of itself is insufficient to confer supervisory status within the meaning of Section 2(11). *Dino & Sons Realty Corp.*, 330 NLRB 680, 687 (2000).

The Supreme Court in *NLRB v. Health & Retirement Corp of America.*, 511 U.S. 571, 573–574 (1949), established the test for determining whether an employee can be deemed a supervisor under Section 2(11) of the Act.[33]

First, does the employee have authority to engage in 1 of the 12 listed activities?
Second, does the exercise of that authority require "the use of independent judgment?"
Third, does the employee hold the authority in the "interest of the employer?"

These questions must each be answered in the affirmative for an employee to be found a statutory supervisor.

Notably, the party claiming that an employee possesses supervisory authority under the Act has the burden of proof in establishing this status.

Regarding statutory agency, the Board applies common law principles of agency to determine whether an individual possesses actual or apparent authority to act for an employer, and the burden of proving an agency relationship is on the party who asserts its existence. See, e.g., *Pan-Oston Co.*, 336 NLRB 305 (2001). "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question." *Southern Bag Corp.*, 315 NLRB 725 (1994). The test is whether, under the circumstances, employees would reasonably believe that the alleged agent was reflecting company policy and speaking and acting for management. See, e.g., *Pan-Oston Co.*, supra, citing *Waterbed World*, 286 NLRB 425, 426–427 (1987), enfd. mem. sub nom. *Omnix International Corp.*, 974 F.2d 1329 (1st Cir. 1992).

Notably, in *Facchina Construction Co.*, 343 NLRB 98 (2004), the Board held that an employer's foreman whose duties included giving employees their daily assignments and work instructions as well as dealing directly with employee requests to leave work early or take time off possessed the apparent authority to act for the employer. The Board in *Facchina* noted that apparent authority does not turn on whether the foreman was acting pursuant to specific instructions of the employer but, rather, turns on whether the employer placed him in a position that employees could reasonably believe the foreman was speaking on behalf of the employer.

Thus, on balance, the Board looks to whether under the circumstances the employees have just cause to believe the person is acting for the employer. *Albertson's, Inc.*, 344 NLRB No. 141 (2005).[34]

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[33] *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713 (2001); and *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979). See, also, *Air 2 LLC*, 341 NLRB No. 23 (2004), where an individual took over a portion of duties of another person who undisputedly was a supervisor and, under circumstances and job functions, held to be a supervisor within the meaning of the Act.

[34] The Board has indicated that while not dispositive of the issue of agency, it will consider whether the statement or actions of an alleged agent were consistent with statements or actions of the employer, noting that such consistencies support a finding of apparent authority. *Albertson's, Inc.*, id.

Considering the record as a whole and the pertinent arguments of the parties, in agreement with the General Counsel, I would find and conclude that Stockman is a statutory supervisor or, in the alternative, a statutory agent.

It is clear and undisputed that Stockman replaced an individual who was acting in a supervisory capacity in the molding department, although Stockman's official job title—process technician—did not change and it is not clear whether he assumed all of the duties of the former supervisor. However, Stockman's duties did change in certain material respects, as accurately recited by the General Counsel.

Significant to me was his being given the duties of assigning workers to specific projects in the molding department. Notably, in the performance of these duties, Stockman seemingly employed individual discretion and determined based on his knowledge of what the job entailed and the capabilities of the available machine operators, who was to be assigned to the production effort at hand. Stockman created an assignment board and posted daily who was to work on a given project. In my view, this was not simply a rote or ministerial function, and it seems Stockman was not given any prior instructions by his supervisors in assigning machine operators. He clearly used his independent judgment in making assignments. I note that the Respondent's management witnesses emphasized the importance of quality control—making good parts—to the business. In this regard, Stockman's role in the assignment of the best workers to make parts was integral to the success of the Company's operations and, in my view, imbued him with statutory supervisor status.[35]

In the alternative, Stockman's daily duties and responsibilities, which are not disputed, establish to a legal certainty in my view that he was a statutory agent. Notably, the credible testimony of former and current employees indicates that they all regarded Stockman as their "foreman" (and not a process technician) to whom they would go for various and sundry employee concerns. At the hearing, Stockman described himself with some pride that he was a "supervisor" and signed employee evaluations using that moniker. Thus, he clearly held himself out as an individual associated with and part of management. The Respondent did nothing to dispel this and, of course, can be said to ratify or acquiesce in his actions towards the employees. Notably, also the molding employees did not regard Stockman as a fellow employee as evidenced not only by their routinely seeking permission from him to take leave and breaks and the like, but also in their not inviting him to the employees-only Easter Monday meeting.

On this record, in my view, it is abundantly clear that Stockman openly reflected and administered company policy and acted on management's behalf as he performed his duties. The Respondent's employees could reasonably believe by virtue of those duties and responsibilities that he was speaking on behalf of the Company.[36]

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[35] While the General Counsel has accurately related some of Stockman's other duties, I believe these are more ministerial and clerical in nature which, for purposes of legal sufficiency, inadequately imbued him with the type of discretion called for by the statutory definition of supervisor.

[36] As noted, the Respondent did not argue this point in its brief. I would assume that the Respondent has conceded this point.

Thus, as a statutory supervisor or agent, Stockman's statements (and actions) can be attributed to the Respondent. The threshold question is whether he made the statements in question or took the actions as charged.

I would find and conclude that Stockman, as testified to by Yakes, approached her on or about March 24 and told her that her work duties had been changed because management had been informed that she was the one who started the Union, that the change—pulling her off the floor—was management's retaliation. Obviously, as here, where the situation is one-on-one, the credibility of each participant is the crucial factor. I have credited Yakes for several reasons. First, I had the opportunity to observe her throughout the hearing when she testified and, generally, she appeared to be composed and natural though understandably somewhat nervous, which would account for some insignificant memory lapses. She, nonetheless, recounted the events in question evenly and without obvious hostility. She seemed sincere and, of course, being a current and longtime employee, testified at some pecuniary risk. I would credit her testimony over Stockman's denial, noting that her version of this encounter squares with other events and testimony associated with this case.

Having found that Stockman made the statements to Yakes on March 24, I would find and conclude in agreement with the General Counsel that the remarks were unlawful because the remarks reasonably conveyed to her that she was suffering a negative effect to her job because of her union activities.[37]

Regarding Stockman's alleged creation of the impression that employees were under management's surveillance, I would find and conclude that this allegation should be dismissed.

At the outset, I have credited Davis' testimony about the conversation she said that she had with Stockman, giving rise to the charge. She testified forthrightly in my view, both on direct and cross-examination, and exhibited no hostility to the Respondent. While Stockman denied certain aspects of the purported conversation with Davis, he indirectly supported her in others. For example, he conceded that employees did consult him about the Union or unions in general and that employees told him they felt they were being watched by Leonardi or other managers. Accordingly, I would specifically credit Davis' testimony that Stockman on March 29 told her and Farnsworth that Leonardi knew about the employee meeting, knew what the employees discussed as well as who attended, and basically knew everything about the meeting.

The question for me is whether these statements would, under the circumstances of this case, cause employees reasonably to believe that management was watching them, peering over their shoulders as it were, to see if they were engaged in union activities so as to discourage them from engaging further in such activities.

I would answer this question in the negative. First, the whole notion of the meeting started with a number of first-shift molding employees—Yakes and Czerniawski being prominent in the early discussions—who, in turn, spoke to employees on other shifts about the meeting and its purposes and objectives. Employees were told that the meeting would not include any

[37] I note on this score other employees (Davis) noticed that Yakes was no longer giving breaks and that management (Stockman) told an employee (Czerniawski) that Yakes was suspected of being a ringleader for the Union. Accordingly, Stockman's March 24 statement to Yakes, combined with her being taken off the floor, reasonably had a potentially chilling effect on other employees who could reasonably infer that their jobs would be negatively affected if they were to exercise their right to associate.

union or management representatives. Neither Yakes nor Czerniawski testified that they were impeded or constrained in any other way in communicating their intentions. In short, all employees interested in discussing matters of mutual concern were invited to attend by presumably Yakes and other employees. This being the case, the Respondent's supervisors could have quite easily, and without surveillance, gained knowledge not only of the meeting but those who attended and what was said and passed this information on to upper management. Moreover, the meeting was held in a public park along a major thoroughfare. In the same fashion as Leonardi and Britt, any of the Respondent's employees could have passed by the park and observed fellow employees gathered there and mentioned the matter to their respective supervisors, who could then pass the information on to the higher echelon. The meeting itself was not in any way a secret affair and nor was it restricted only to employees in favor of change or the Union at Mold Masters. Davis, Yakes, and Czerniawski were evidently prime movers and organizers of this meeting and it seems each invited various employees from all shifts in molding to attend and all knew or reasonably would anticipate that invited employees might pass on to management what transpired at the meeting as well as who attended.

Notably, the record here supports a reasonable inference that perhaps not all of the Respondent's employees supported what Yakes, Davis, and Czerniawski were about and, after attending the meeting, could have taken it upon themselves to report to management about the meeting.[38]

All in all, with these circumstances in plan, contrary to the General Counsel, I am not persuaded that Davis or any employee could reasonably believe that her union or other protected activities were under surveillance or that Stockman, a person whom Yakes and others voluntarily included in their plans for the meeting, created the impression that they were being surveilled by management. I would recommend dismissal of this aspect of the complaint.

Regarding the alleged interrogation of employees by Stockman on March 29 in his conversation with Davis, here, too, I have credited Davis' version of the event. I would find and conclude that Stockman's request of Davis for the names of meeting attendees and his promise to render the employees some unspecified assistance if she disclosed the names was patently and inherently coercive and blatantly interfered with her Section 7 rights. I note that at the time of this encounter, not only was the union organizing effort in full flower but Stockman had already informed Yakes, with whom Davis was working to improve working conditions, that she was being retaliated against for her union activities by Leonardi. Stockman, a mere 2 days later, now was informing Davis that Leonardi knew of the employee meeting and wanted to know who specifically attended. Stockman's interrogation—coupled with his promise of "help" if the employees cooperated and, conversely, unspecified harm if they did not—conveyed reasonably to Davis that management needed the information to influence employees in some way and he was willing to reward or, by implication, punish employees, depending on their willingness to inform on fellow workers. I would find a violation of Section 8(a)(1) of the Act in this regard.

Turning to the allegations of charging the Respondent with violating Section 8(a)(3) by not allowing molding employees to work together, the threshold issue for resolution is whether on or about March 29, Stockman told Czerniawski that essentially he was under instructions

[38] In this regard, I am mindful that Yakes was complained about by another employee (Chase) and that the union representatives testified that despite an initial strong showing, support for the Union waned significantly among the employees.

from upper management not to allow molding workers to work together in order to avoid their talking with each other, presumably about the Union or other employee concerns.

Czerniawski credibly and without contest testified that she and Stockman were on good terms and as she said, had lots of conversations with him while employed at the Company. It appears that the two enjoyed a positive working relationship and Stockman was evidently a somewhat sympathetic manager regarding the employee issues. In relating her testimony about these matters, Czerniawski, as I viewed her, was calm and not affected by any animosity toward the Respondent or the Respondent's counsel, answering his (and the General Counsel's) questions honestly, directly and matter-of-factly. She was firm, confident, and responsive in her testimony. She came off as a quite reliable witness as I observed her. Accordingly, I would credit her testimony regarding Stockman's statement to her.

Applying *Wright Line* to this allegation, I would find and conclude that counsel for the General Counsel has met her initial burden. There is little or no doubt on this record, and as I have previously determined in my discussion of the 8(a)(1) allegations, that Stockman and upper management by March 29 were fully aware not only of the Union's organizing efforts but also that the employees, mainly the molding workers, had met the day before in the park and were discussing job-related concerns. In agreement with the General Counsel, I believe that the Respondent's treatment of Yakes—changing her work duties—was the first step in its plan to isolate a suspected union ringleader from her fellow workers. By March 29, the Respondent, and Leonardi in particular, was aware that the molding employees were meeting as a group and discussing working conditions. Accordingly, the second step undertaken by the Company was to separate the molding workers from each other to prevent their collaborating on the job.

In terms of animus, I will be brief. Practically, from the first day the Union showed up at the facility, the Respondent exhibited animus toward the Union and its campaign; in my view, that animus continued until the Union ceased its organizing efforts and pervaded the Company's relationship with its work force, particularly for certain employees like Yakes and spilled over onto others like Bakke. Leonardi's animus was particularly evident in terms of the language he used to describe unionists (riff-raff), as well as what I observed from his demeanor while testifying at the trial. There was palpable anger and resentment as he testified about the Union and its efforts to organize his Company.

Regarding the Respondent's defense, I note that Stockman did deny he told Czerniawski that he was under instructions to separate the molding workers. Stockman, consistent with the Respondent's main defense, said that flocking personnel were paired with molding workers as part of the Collins and Aikman job.

In agreement with the General Counsel, I believe that the Respondent's proffered justification was a pretext for its overarching plan to thwart the Union and the molding workers. Notably, by March 29, the Collins and Aikman pull-out was indeed in effect. However, while not second-guessing the Company's decision to deploy its work force as it sees fit, the decision to separate the molding workers at that particular time is highly suspicious in my view. As pointed out by the General Counsel, this move was made much too close in time with the union campaign and the molding workers' meeting to be emblematic of a legitimate business decision. I note on this score that the Collins and Aikman pull-out was a known fact much before the March 29 separation of the molding workers. As I will discuss later, I believe that this move was actually only a part of the Respondent's efforts to rid itself of the Union and discourage employee efforts on behalf of the Union.

I would find and conclude that the Respondent violated Section 8(a)(3) of the Act in ordering the separation of the molding workers on March 29.

3. The AuFrance allegations

Michael AuFrance, the highest level manager in the molding department, Stockman's boss, and an admitted supervisor, is charged with unlawfully threatening to commence enforcement of a work rule which required employee to punch in and out to use the restroom on March 29, 2005, in violation of Section 8(a)(1) of the Act. He is also charged with changing Yakes' regular work duties to exclude giving other employees breaks or working on the production floor on March 23; issuing Yakes a 2-week suspension on May 9; and, along with other managers, issuing Yakes a written warning on June 1, all in violation of Section 8(a)(3) of the Act.

Czerniawski testified that sometime after the advent of the Union, employees were required to punch in and out to use the bathroom when not on their regular breaks. Czerniawski said this rule was not enforced before the Union. Czerniawski recalled that she first learned of the punch out and in bathroom rule because a letter to this effect was posted by her computer; her boss, AuFrance, also had, in fact, come around and so informed her and the other first-shift employees. Czerniawski said she also saw a sign posted by the timeclock informing employees of the rule, but she did not see this until around the end of April or the beginning of May 2005. [39] Notably, she was certain that her observation of the sign and AuFrance's informing her of the requirement occurred after the campaign's commencement.

Czerniawski stated that prior to the Union's advent, she did not clock in and out to use the restroom and that management, in her view, knew that she was not following this procedure.[40]

Davis testified that she knew the Company maintained work rules but, in her view, they were not enforced. According to Davis, the day after the Easter Monday meeting, management really started in earnest to enforce rules. Illustrating her point, Davis related an incident involving AuFrance on a day some time after the Easter Monday meeting.

According to Davis, she had left her machine to get some supplies and saw AuFrance in the area where supplies were stored. AuFrance pointed to a posted sign and said we (employees) had to punch out and in for breaks, and that he was going to have to start enforcing the policy. Davis stated that before this incident, she had never clocked out to use the restroom in spite of the signs being up on display since possibly May 2003. [41] According to

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[39] Czerniawski identified Jt. Exh. 10 as a copy of the sign she observed posted near the timeclock. Czerniawski also stated that before observing the posted sign, she had never seen any such similar posted rule during the entire time she worked for the Company. Though she could not remember the date, Czerniawski said that AuFrance's informing her of the rule and her seeing the posted sign occurred on the same day.

[40] Czerniawski was emphatic in this assertion, explaining that prior to the Union when she used the bathroom, her machine was down and she merely informed Stockman or a process technician Craig (Williams) of her intentions. Czerniawski said that she was never asked to punch in or out.

[41] Davis identified Jt. Exh. 10, the bathroom break notice, as a copy of the sign which she initially said had been posted "for a while." (Tr. 278.) Later in her testimony, Davis said the sign had been posted since May 2003.

Davis, before her encounter with AuFrance, managers observed employees going to the bathroom and no one was told that there was a problem about not clocking out.[42]

Trowbridge likewise stated that before the union drive, employees could leave their work stations for any number of reasons; for example, to locate a molding tech, deal with a machine problem, or simply to go to the bathroom. According to Trowbridge, management never said anything about an employee leaving her machine. Trowbridge said that before the Union when an employee needed to use the restroom, she knew to secure a relief person to handle the machine (if it were running) and to go and come right back; this was the ordinary practice.

Trowbridge also said that management surely knew that employees were taking their restroom breaks in this fashion as one could be easily observed leaving and returning to the machine and, moreover, there was a relief person standing in the place of the employee assigned to the particular machine.

Trowbridge said that before the Union she had never seen the sign (Jt. Exh. 10) that informed employees of the punch in and out requirement. She said that using the bathroom was simply not an issue prior to the Union's advent. Trowbridge stated that around the first of April 2005, she observed the sign for the first time. According to Trowbridge, around early April, AuFrance came around and told the employees not to leave their machines except for allowable breaks, lunch, and after-hours. She noted that prior to AuFrance's announcement, management never said anything about leaving one's machine and she never clocked out to use restroom facilities.[43] However, after AuFrance told the employees not to leave their machines except under permitted circumstances, he also imposed a rule whereby operators who needed assistance (for whatever reason) were to stand near the machine at the end of the aisle and wait for help, basically to remain at the machine. These changes all took place, according to Trowbridge, around the first of April but certainly after the Union had distributed its fliers. Trowbridge noted parenthetically that in order to clock out and in to use the bathroom, she had to go out of her way.[44]

Yakes also testified about the matter of bathroom breaks. She, like the other employees who testified previously, stated that employees were not required to punch in and out to use the restroom prior to the union drive. After the Union's advent, around mid-March, employees were not allowed to take restroom breaks without punching in and out, and that AuFrance basically imposed a rule not permitting one to leave her machine without his approval. Yakes identified the sign that was posted (Jt. Exh. 10) and acknowledged that it had been on display in the flocking department and perhaps even in the molding department, but the rule had not been enforced in probably 2–3 years.[45] Yakes said no one in molding ever clocked in and out for

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[42] Davis conceded that even after implementation of the new bathroom rule, she left her machine without clocking in or out, that her manager knew this because it was obvious when a machine was down and not manned by the worker assigned to it. Davis said that she was not docked pay for her noncompliance with the rule, though management said employees would be.

[43] Trowbridge acknowledged, however, that the Company always had rules about not leaving your machine, including going to the bathroom.

[44] As I observed her, it seemed to me that Trowbridge was trying to convey her feelings that the rule not only was inconvenient but also cost her time for which she was not to be paid if the rule were enforced. Trowbridge was also aware that there was more than one timeclock in the facility, one in flocking and one in molding, and employees could use either.

[45] Yakes candidly acknowledged that she had heard of some enforcement efforts of this rule from other employees, but she was never directly told of the policy by any managers.

bathroom breaks prior to the Union's arrival and that, in her view, management knew of this practice. According to Yakes, AuFrance, around mid-March, informed the employees of the new rule which basically instructed employees not to leave their machines.

AuFrance stated that he was familiar with the Company's work rules and that these rules, including the bathroom rule, had been in place since he began his employment with the Company and, in his view, even before his arrival. He noted that while the rule requires the employee to punch in and out to use the restroom or face having his pay docked, in point of fact, no employees have been docked; that the Company would only consider docking pay in the case of excessive breaks, those exceeding 5 minutes or so. AuFrance said the rule is rarely enforced[46] but that the rule and its enforcement is not connected to union activity.

AuFrance stated that when he was hired, it seemed to be a common practice for machine operators simply to wander around leaving their machines unattended while they looked for assistance. AuFrance said he wanted to change this practice. Accordingly when a machine had a problem, he instructed employees to come to the end of the aisle and try to get assistance from a technician or supervisor; he did not want operators to leave their machines.[47] AuFrance explained that he implemented this policy in about June 2004 shortly after assuming his job and that his decision to enforce the policy had nothing to do with any union activity then or during the instant union organizing drive.

Yakes testified that on March 23, AuFrance told her at 9 a.m. that she was not to give breaks that day, but was just to stay busy.

Yakes also stated that the day after the Easter Monday meeting, she returned to work and was told by AuFrance that she was not allowed to be on the production floor at all, that she was not to drive the hi-lo through the production floor. According to Yakes, AuFrance said that he had been instructed the previous week (the week encompassing March 23) to keep her busy doing other things and off the floor completely. Yakes said she asked AuFrance if she was about to be fired, to which AuFrance replied that he did not know what was going on.

Around this time, Yakes said that rumors were floating about the facility that management had heard about the employee meeting in the park. In fact, Yakes said that she was told by fellow employee Maria Melachowski[48] that Hugo Leonardi himself had told her that he had Yakes at the top of this list as a troublemaker. Yakes said that Leonardi supposedly told Melachowski that he was disappointed and could not trust anyone anymore, that the employees were stabbing him in the back.

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[46] AuFrance said that actually he only became aware of the bathroom rule because shortly after his being hired, an employee was taking excessive bathroom breaks—two to three per day—which caused him to check with human resources about any rules governing this behavior. He was then told about the rule and the Company's policy that breaks exceeding 5 minutes would be deemed excessive.

[47] AuFrance explained that operators need to stay with their machines for safety-related reasons. For example, if a machine goes down, there is a reason for it, such as a ruptured oil line. Operators in such a case need to stay there and turn the machine off to prevent further damage.

[48] Yakes initially could not recall who told her that management was aware of the meeting but, when shown her affidavit of June 5, 2005, recalled that fellow employee Maria Melachowski told her at the end of her shift in the presence of employees Marilyn Farnsworth and Christine Czerniawski.

Yakes noted that on March 23, when AuFrance was told her not to give any breaks, she was not assigned any regular machine operator duties. However, by March 31, she said that she was completely pulled from the floor and was assigned full-time as a machine operator. She conceded that AuFrance told her this was basically to finish the Collins and Aikman job.

AuFrance, conceding that he told Yakes not to give breaks, said that he told her that she would not be needed to do this because employees from the flocking department would be coming over to molding and they would help with breaks. AuFrance said that he informed Yakes that she would be needed to perform her materials handler job and not be tied up on a machine. AuFrance denied any connection of this change to her union activity on her part. AuFrance noted, in fact, that historically employees have been moved by management between jobs, usually during busy times such as the spring of 2005 when the Collins and Aikman matter cropped up. AuFrance stated that the Company, around the time Yakes was instructed not to give breaks, moved three workers from flocking and put them on the Collins and Aikman job as well as perhaps five to six employees from another department. He noted that, ultimately, Yakes also was among those moved to help with the Collins and Aikman production effort.[49]

Yakes testified that she had been disciplined by the Company prior to the spring of 2005, but mainly for time and attendance related violations.[50] However, beginning in March 2005, specifically after the employee meeting, Yakes said that her disciplines started to increase. Yakes noted that she received a discipline on March 31 from Nicole Wendland, the human resource manager, for violating the Company's solicitation and distribution policy, which basically prohibited nonwork-related conversations between and among employees during work hours.[51]

Yakes stated that about a week later—on April 7—she was again called to Wendland's office and told of an employee complaint against her for talking about nonwork matters. Moreover, she was told by Wendland that Leonardi had himself witnessed the incident and was very upset.[52] Yakes said that she explained that the conversation she had had with a fellow employee was work-related and, indeed, the Company later that day corroborated her version. Yakes said that no discipline was issued to her then, but she was warned by Wendland about repeated infractions for talking.

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[49] It is noteworthy that Yakes explained that when she said that she was taken off the floor, she means taken from her regular duties as a materials handler; that is no longer giving breaks and being assigned as machine operator full-time. Yakes also noted that Bruce Fanzler, the other materials handler on her shift, was initially assigned to a machine when she was. However, Fanzler, according to Yakes, was not in that assignment for very long and was sent to the receiving department. Yakes did not know if Fanzler was ever told not give breaks by management, but she knew that he gave breaks because he even gave her a break while she was operating a machine. (Tr. 148.) Fanzler did not testify at the hearing.

[50] See R. Exh. 1, various written disciplines of Yakes for the period covering February 12, 1990, through August 6, 2003. These records indicate that Yakes was also disciplined for reasons other than time and attendance.

[51] See Jt. Exh. 3, the March 31 written warning issued by Nicole Wendland, the human resources manager. This disciplinary matter is the subject of a separate complaint allegation committed by another manager and will be discussed later herein.

[52] This incident forms part of a separate complaint allegation which will be discussed later herein.

Yakes also noted that she was written up by AuFrance on April 27 for carelessness relating to some defective parts discovered during a GP 12 inspection.[53]

Yakes said that she was again disciplined on May 3, 2005 by AuFrance for carelessness, this time for not having properly installed heat staked gaskets which were discovered during another GP 12 inspection.[54]

On May 9, Yakes said that she received another written discipline by AuFrance—this time for substandard work quality, substandard productivity, and carelessness—and was suspended for 2 weeks without pay for these infractions and warned that a repeat offense would result in her termination.[55]

Yakes related that Wendland and AuFrance early in the morning showed her the defective (gouged) part in question. Yakes said that she explained to the two that she had seen the gouged part and told Dave Spencer, the operator with whom she was working, about the problem; she thought that he had taken care of the problem. Yakes said on this occasion she was assigned packing the parts and explained this to her supervisor in an attempt to avoid responsibility for gouging them. Yakes conceded that her sticker and employee number were on the affected parts although usually, in a two-person operation, the stickers of both persons should be affixed to parts.

Later that afternoon, Yakes said that AuFrance called her to his office and presented the suspension writeup to her. According to Yakes, AuFrance said that she was being suspended for having three violations, all relating to carelessness, and that the suspension writeup was directed from upper management. Yakes said that she protested to AuFrance that suspension was not warranted because her previous writeups were not for the same infractions.[56] At the hearing, Yakes said she actually does not wholly dispute the issuance of the discipline but only its length of 2 weeks; in her view, this was excessive.

Yakes said she spoke to Wendland on the following day around 8:30 a.m. because AuFrance had said the suspension decision came from upper management. Yakes said that she complained to Wendland that her work history did not include writeups for this and she had never received time off for bad parts. According to Yakes, Wendland said the writeup was done according to the employee handbook and to do otherwise would show favoritism. Wendland said that the suspension emanated from Leonardi, who was upset with Yakes, and there was

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[53] See Jt. Exh. 4, the April 27, 2005 discipline. Yakes explained that on that day she was actually working with another operator who had been transferred from the flocking department and the machine malfunctioned. While she was written up, Yakes felt that either she or the other worker or both could have been responsible for the bad parts. This discipline is not charged as a violation of the Act.

[54] See Jt. Exh. 5, a copy of the May 3, 2004 discipline. Yakes wrote on the form that she accepted 50 percent or half of the blame for this infraction because she was working in a two-man machine operation. She felt that either of the two could have packed the defective part. This discipline is not asserted to be violative of the Act.

[55] See Jt. Exh. 6. This discipline states that a GP 12 inspection disclosed several gouged parts on which her employee number appeared.

[56] Yakes admitted at the hearing that the parts in question were bad although she did not know how many parts were involved. Yakes said she had never repeated this offense and she was doing her part of the job and did not have time to check her teammate's work. She had never been suspended for bad parts before.

nothing Wendland could do. Yakes said that Wendland also said that both she and AuFrance were shocked to see her name on the defective parts.

Yakes noted that Wendland did not point to any specific provisions in the handbook but that, as Yakes understood the disciplinary process, a suspension in her case was not warranted. Yakes said that during her time with the Company, she had not heard of a 2-week suspension for bad parts for a first offense.[57] Yakes said she served the suspension from May 16–May 29, 2005.

Parenthetically, Yakes related that on about April 7 when she was accused of engaging in nonwork conversation with an employee, she had asked to speak with Leonardi to explain to him that when he saw her conversing, she was dealing with machine maintenance matter. When she spoke to him, Yakes said that Leonardi, very upset, told her "you people are talking about the f--king union and I'm going to put a stop to it." Yakes said that she tried to explain to Leonardi that the conversation with the employee was work-related, but he simply walked out. However, the next day, Yakes said that while she was working, Leonardi apologized to her since Wendland's investigation had vindicated her. According to Yakes, Leonardi said that he was mistaken but that with all the "stuff"[58] going on, he could not trust anyone like he used to, mentioning a written threat he had received from an employee and because of which, the police had been called.

Yakes said that she returned to work on May 31. On June 1, Yakes related that she was called to AuFrance's office and informed that she was being written up, essentially for failing to load material in a machine. AuFrance showed her the writeup and asked her why she had not loaded the machine's hopper when she had brought the material to the machine and why had she not completed the job she was assigned as a materials handler.

Yakes said that she told AuFrance that the machine operator, Craig Williams, gave her the impression that he was running samples and never told her he wanted the material put into the hopper, that she evidently misunderstood him. According to Yakes, AuFrance said that her failure to load the hopper was inexcusable and issued the warning.[59] Yakes admitted that she had not loaded the machine as charged but, nonetheless, felt the discipline was unfair since she had just came back from a 2-week suspension and had been off the floor—that is not performing her regular hi lo materials supply function—for almost 2 months. She also noted that the parts run in question was a new job that she had never seen before and, therefore, she felt justified under the circumstances to think only samples were being produced. Yakes said that she was aware that others had been written up for similar infractions but only where there were repeated violations day after day involving two or three machines.

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[57] Yakes said that the discipline process worked as follows as far she understood it: first offense, a warning; second offense a 1-day suspension; third offense, 3 days without pay; fourth offense, 5 days; and any further infractions, possible termination. Yakes acknowledged receiving a copy of the employee handbook (Jt. Exh. 1) and noted her understanding of the disciplinary process was based on the handbook.

[58] Yakes said that in this conversation Leonardi did not mention the Union by name, only "stuff" that was going on. Yakes said that she thanked Leonardi for his apology, telling him that was all she could expect from him.

[59] See Jt. Exh. 7, a copy of Yakes June 1, 2005 discipline. In the employee remarks part of the writeup, Yakes simply says she misunderstood Craig. At the hearing, Yakes admitted that she did not load the machine, which is an important part of her job. She noted that if a machine runs out of material, it may be down anywhere from 1 minute to 1 hour and has to be reset.

AuFrance testified that he was aware of Yakes' May 9 suspension, explaining that he and Wendland showed Yakes the affected parts along with her operator number on it. According to AuFrance, Yakes admitted that she had seen the parts and knew they were defective. AuFrance said that he viewed her admission to reflect intentionally and knowingly passing bad parts which could have instigated a containment action by the customer, a very serious matter for the Company.

Wendland acknowledged meeting with Yakes and AuFrance on the floor where she examined some bad parts possibly produced by Yakes. She met with Yakes to get her side of the matter. According to Wendland, Yakes admitted that she knew the parts were of poor quality and so informed the machine operator with whom she was paired; Yakes said she thought he had corrected the problem. However, Wendland said that Yakes had no answer for having boxed up the parts knowing they were defective. Also, according to Wendland, Yakes could not provide any reason for not contacting a supervisor about the bad parts.

Wendland said the suspension was ultimately authorized by Leonardi. However, Wendland noted that Yakes had been given two prior warnings for substandard work, including carelessness. Wendland felt that the severity of the punishment was justified because Yakes admitted to having knowingly boxed the bad parts.

Wendland acknowledged that the other employee working with Yakes at the time, Spencer, was not similarly suspended because this was his first writeup for poor parts, which violation does not warrant a suspension. Wendland noted that the Company, prior to Yakes' suspension, has disciplined employees for making and packing bad parts, substandard work, and carelessness.[60]

Leonardi acknowledged that it was his decision to issue Yakes a 2-week suspension on May 9, 2005. Leonardi explained that he issued Yakes a 2-week suspension instead of "automatically" discharging her for the infraction. According to Leonardi, intentionally damaging company property or sabotaging customer parts are severe offenses warranting discharge on the spot according to the company handbook. He viewed Yakes' conduct as being of the intentional type since she admitted that she knowingly packed bad parts. Leonardi said that he would have fired her then and there, were it not for advice he received from his attorney who said that with all the union activity going on, the better course would be not to discharge Yakes.

Leonardi said his attorney advised that he should not look like he was picking on someone in particular. Leonardi said that he thought that firing Yakes would make the

[60] Wendland identified R. Exhs. 4, 5, 6, 8, and 9, numerous documents she obtained from the Company's discipline files. R. Exh. 4 contains copies of first notice disciplines of a number of employees who were generally warned of the violation and threatened further discipline for repeated incidents. R. Exh. 5 contains copies of second or final notice disciplines to various employees, some of whom were suspended for bad parts. The suspensions were for 1 to no more than 5 days and appear to have been generally issued as a second offense, although three were exceptions. R. Exh. 6 is a copy of a single document indicating that an employee was discharged by the Respondent on April 15, 2004, for substandard work quality and carelessness. R. Exh. 7 contains copies of a number of employee disciplines—written warnings—for pulling bad parts, threatening future discipline up to and including suspension and termination. These appear to be first notices. R. Exh. 9 indicates that an employee was terminated for a third offense--packing bad parts—on January 22, 2004.

Company look bad, based on his attorney's advice, and chose to suspend her as opposed to firing her. Leonardi emphasized that he would have fired Yakes were it not for the ongoing matter with the Union. (Tr. 49.) Leonardi said that in any case he would have imposed some sort of discipline on Yakes for the offense.

Regarding Yakes June 1 discipline, AuFrance acknowledged his role. He explained that at the time the Company was starting a new job and Yakes was instructed to bring material to a machine that was to be loaded for parts production, and this she did. However, Yakes did not load the material so that when the machine was ready to start up, there was no material in the hopper. AuFrance also acknowledged that Yakes' excuse was that she thought the machine was in a sample-run mode and that the material was not needed in the hopper. However, AuFrance said he did not accept this and told Yakes that her job as a materials handler was to bring material and load it.

AuFrance said that Craig Williams, the machine operator who had requested the material, also told him that he had advised Yakes to this effect. According to AuFrance, Williams said he never told Yakes to deliver the material and not load it. AuFrance said that accordingly, he concluded that Yakes' excuse was not acceptable and wrote her up.

The General Counsel argues that AuFrance's pointing gesture to employee Davis that she (and the other employees) had to start punching out and in to use the bathroom according to the posted sign and that he was going to have to start enforcing this policy, constituted an unlawful threat because the policy was only commenced and enforced because the union campaign was afoot. The General Counsel concedes that the sign advising employees to punch in and out may have been posted at various times at some of the timeclocks prior to the Union's advent and the punching in and out policy may have been even technically in effect for some time. However, the General Counsel contends the enforcement of the policy, including threats to dock workers' pay, was sudden and unprecedented at the facility, since employees in molding had never been told by supervisors before the union campaign that there was a problem with their going to the restroom without clocking in and out.

The Respondent contends that AuFrance credibly testified that the bathroom rule was in place before he was employed with the Company in June 2004, and that he started enforcing the rule when he noticed employees taking excessive bathroom breaks. The Respondent asserts that AuFrance's denial of any connection of his enforcement policy with ongoing union activity should be credited.

Regarding AuFrance's alleged change of Yakes regular work duties—eliminating her employee relief function—on March 23, the General Counsel submits that this was done by the Respondent because of and in retaliation for her suspected involvement with the Union, as attested to by Stockman who told her as much the next day. The General Counsel asserts this move was made to cut Yakes' access to the molding workers whom the Respondent felt Yakes was talking to about the Union.

Evidently conceding that AuFrance told Yakes to discontinue giving molding employees breaks on March 23, nonetheless, the Respondent argues that AuFrance credibly testified that his sole motivation for the change was the transfer of flocking department workers over to molding who could then assist with breaks. In this fashion, Yakes was free to work solely as a materials handler.

Regarding Yakes' suspension on May 9 and the June 1 disciplinary writeup, the General Counsel contends that these were unlawful and motivated by the Respondent's view that Yakes was a ringleader of the union campaign and they were determined to get rid of her.

The General Counsel notes that Yakes had never been suspended for bad parts and even when she was suspended in the past, it was never for such a long period. She also points out that the offenses for which Yakes was suspended constituted a less serious offense according to the company handbook. Significant to the General Counsel is the fact that other employees involved in Yakes' May 9 and June 1 infractions were not given discipline of the severity of Yakes. Moreover, a number of other employees, around May 3–10, were disciplined for carelessness or bad parts-related infractions. However, the disciplines imposed on them were either a verbal or first written warning and in any case entailed no unpaid time off.

The General Counsel also points out that in the past, only two employees had received 10-day suspensions but these occurred in July 2004, and the violations involved were of the more serious (Group II) type according to the employee handbook and entailed a history of problems, unlike the infractions with which Yakes was charged.

The General Counsel also notes that in February 2004, an employee was charged with "packing bad parts to be sent to a customer"—Yakes' charge—but that employee received only a warning. The General Counsel further argues that at least one employee received three writeups for carelessness and substandard work quality between June 29 and July 18, 2005, and did not receive any time off. Thus, she submits that the Respondent's claim that Yakes received her suspensions for repeated violations is a mere pretext to cover up its unlawful behavior.

The General Counsel cites other examples taken from the Company's records of disciplines markedly different from the punishment Yakes received, yet for similar behavior. On balance, the General Counsel essentially contends that AuFrance, with the willing and knowing participation of the highest level of Respondent's management, suspended Yakes on May 9 and wrote her up on June 1 because of her union involvement and other protected activities and that Respondent's defense of its action is pretextual.

The Respondent asserts that Yakes' suspension on May 9 was for knowingly producing about 41 separate defective (gouged) parts that were packed for shipment to a customer. The Respondent submits that this singular act could have cost it possibly $40,000 if a containment were ordered. Moreover, Yakes admitted that she failed to contact a supervisor or otherwise address the matter with management. She also failed to inspect other parts after she noticed the problem, but simply packed the parts. The Respondent submits that it has consistently disciplined employees for producing and packing bad parts from at least January 2003 to the hearing date.

The Respondent asserts that Yakes' actions were especially harmful and, in the Company's view, were considered deliberate and tantamount to sabotage. Clearly, it asserts, she would have been discharged had not the Company's counsel advised against such a move. Beyond the seriousness of her actions on May 9, the Respondent notes that Yakes had received previous disciplines making the suspension on May 9 warranted.

As to the June 1 writeup, the Respondent asserts that AuFrance rightfully wrote her up for failing to load the machine in question. The Respondent notes that AuFrance conducted an investigation of the matter and determined that Yakes did not load the machine, and that the person who asked her to bring material to be loaded did not instruct her not to load it.

Accordingly, consistent with its past practice of disciplining employees for not loading machines, Yakes was written up.

Based on the credible testimony of Czerniawski, Davis, Trowbridge, and Yakes, it would appear that while the Respondent did have a previously existing rule for using the restroom, including the punching in and out and possibly docking of pay for failure to comply, this rule and the attendant procedures were not consistently and uniformly enforced. In addition, of all the many employee disciplinary records covering a plethora of infractions adduced by the Company at the hearing, there is nary a one relating to a violation of the bathroom rules. Considering that we are talking about basic and necessary human bodily functions, this would not be a likely result if the rule were being enforced in some fashion. In my view, it was not, at least prior to the advent of the Union.

I would find and conclude that the General Counsel on this record has established that the enforcement of the preexisting rules regarding bathroom use was commenced primarily in response to the union campaign and that AuFrance's threat to enforce the rule against employees in that context was unlawful.

Regarding the change in Yakes' work duties by AuFrance on March 23, consistent with my findings and conclusions associated with Stockman and for similar reasons, I would find and conclude that AuFrance violated Section 8(a)(3) of the Act in ordering her not to give breaks to other employees on the floor, which I view as a material change in her normal work duties, to discourage her and other employees from supporting the Union or engaging in protected activities. I have considered AuFrance's claim of business necessity in ordering the change but consider it, in agreement with the General Counsel, to be pretextual.[61]

Turning to AuFrance's disciplines of Yakes on May 9 and June 1, I would find and conclude that in suspending her on May 9, the Respondent violated section 8(a)(3) of the Act; however, I would not so conclude with respect to the June 1 discipline.

First, based on my previous findings and other evidence of record set out herein regarding other matters touching on management's dealings and treatment of her, Yakes was clearly being targeted by management for her suspected support of and involvement with the Union, as well as her aggressive and possibly known participation with the employees who met on Easter Monday. It is noteworthy that from March 23, a few days after the Union held one of its first meetings with employees, through June 1, Yakes was either disciplined or subject to discipline on five different occasions. Yakes was a 16-year employee who admittedly had many time and attendance problems during her tenure with the Company, as well as some other work-related problems covering February 12, 1990, through August 6, 2003. Yet, over this period, she was merely given warnings and suspensions on three occasions totaling about 7-1/2 days.[62] It seems that before the Union, Yakes was considered a good and reliable employee, even with her somewhat checkered employment history.

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[61] With respect to my findings here, I have credited the testimony of Yakes. While AuFrance, in my view, offered plausible reasons for Yakes' change in assignment, I am influenced more on the strength of Stockman's statement that management viewed Yakes as a ringleader and was retaliating against her. I believe AuFrance was merely acting on those instructions out of management's suspicions about Yakes and her involvement with and support of the Union.

[62] See R. Exh. 1, copies of Yakes' disciplines covering the above referred to period. I note that on April 30, 1993, Yakes was disciplined with a 5-day suspension for reckless operation of

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Regarding the Respondent's claim that Yakes was merely disciplined properly in accordance with the handbook and consistent with prior disciplines of other workers over time, I note, like the General Counsel, that while other employees evidently received disciplines for offenses on their face similar to that issued Yakes, it is not at all clear what circumstances surrounded the disciplines, and there is no indication that any such disciplines were issued in the midst of a union campaign or employees conducting their own meetings for improvement in their work conditions. In short, it is not clear to me, based on the simple existence of a record of employee disciplines, that we are comparing apples to apples. Therefore, I am not persuaded from the mere demonstration of a disciplinary track record as it were, that Yakes was not disparately treated on May 9.

Furthermore, I am troubled by the severity of Yakes' punishment—10 days without pay. This was an extreme punishment in my view, and one seemingly only consistent with management's hostility to her. The Respondent justifies the punishment by characterizing her conduct on May 9 as sabotage. Notably, others have been disciplined for packing bad parts and there was no proof adduced that they were so severely judged and punished as was Yakes; nor were these employees accused of sabotage.

Then, too, Leonardi testified that he would have terminated Yakes on May 9, such was his anger with her for, in his view, knowingly and intentionally packing the damaged parts to hurt the Company. However, he admitted he did not fire her because of the ongoing union campaign. Thus, while the Respondent's action reduced the harm to Yakes, nonetheless, the Respondent admits that her punishment in part was motivated by the presence of the Union or because of the Union's organizing efforts, and, in my view, the Respondent's suspicions that Yakes was involved therewith.

Regarding the June 1 writeup, I would find and conclude that the Respondent's writeup of Yakes was not violative of the Act. I note that Yakes herself admitted that she did not load the machine as required, albeit based on her misunderstanding of the nature of the parts run. She admitted also that a failure to load a machine is not without consequence to the parts production process and this was indeed a material part of her job. All in all, I am persuaded that the Company would have taken the action in question—writing her up with a warning—irrespective of her union or other protected activities. I would recommend dismissal of this aspect of the complaint.

All in all, Yakes' May 9 suspension was, in a phrase, a culminating event in the Respondent's effort to retaliate against her for her union support and her rallying the employees to better their terms and conditions of employees. I would find and conclude that in suspending Yakes on May 9 the Respondent violated Section 8(a)(3) of the Act.[63]

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the hi-lo, which evidently caused a fellow worker to be injured. Otherwise, she received suspensions of 2 days and 1/2 day for lateness and defective work, respectively, on October 21, 1996, and June 1 and November 21, 2001.

[63] I suppose, over the long history of the Act, an employer may have reduced a discipline because of union activity by one of its employees. However, in my view, the Respondent here cannot legitimately argue that it would have taken the same action against Yakes irrespective of her union activity. Leonardi admitted that were it not for the Union, he would have fired her. In any case, I believe that the punishment issued Yakes under the circumstances here was primarily motivated by her union and other concerted activities.

4. The Respondent's alleged promulgation of a no-talking rule and Yakes' March 31 discipline

The complaint essentially alleges that since about March 31, 2005, the Respondent, through admitted supervisor/agents Terri Britt, Nicole Wendland, and Angela Swiatkowski, orally promulgated a rule prohibiting nonwork-related discussions by employees because of their support of the Union in violation of Section 8(a)(1) of the Act. The complaint also alleges that Yakes was disciplined for violating this rule because of her union support and engaging in protected activities in violation of Section 8(a)(3).

In addition to the imposition of the clock out/in rule for bathroom breaks, Yakes testified that after the Union came on the scene around mid-March, management, as a practical matter, prohibited all talking at the facility, even in cases where workers were manning the same machine. Yakes conceded that the no-talking rule was not necessarily a new rule. However, prior to the Union's advent, employees could basically talk about any topic but not to excess, which Yakes described as any conversation exceeding 5 minutes. In fact, Yakes admitted that on occasion (presumably prior to the Union), she had been told she was talking too long and ordered to get back to work. However, Yakes said that prior to the Union, the no-talking rule was only enforced in such extreme or excessive situations.

Yakes related that on March 31, she was issued a written discipline[64] by Wendland for violating the Company's solicitation and distribution policy by approaching employees and engaging in nonwork-related conversations during working hours. Yakes recalled that on the morning of March 31, she was called into Wendland's office and advised by Wendland that many employees had complained to her about Yakes' "voicing her opinion" on worktime. Yakes said that she admitted to Wendland that she indeed had talked to fellow employees at work, that it was a natural thing to do. According to Yakes, Wendland said if we (employees) were talking about nonwork-related issues, this should be done on our own time. Yakes said that Vice President Angela Swiatkowski was also at the meeting and said that personal matters should be talked about only on one's personal time, in the break room or the parking lot, but not during worktime. Yakes said that she customarily talked to employees as she performed her duties prior to the Union, and was never disciplined (formally).

Yakes said that she did not receive a copy of the discipline that morning, but was called back to Wendland's office later that day and given the writeup. Yakes said that she told Wendland then that she would comply with the rule. According to Yakes, Wendland advised her that a repeat violation would incur a suspension. Yakes said that she and Wendland were alone in the office at the time.

Czerniawski recalled that a change in the Company's rules regarding workplace conversations possibly took place about a month after the arrival of the Union. She said that AuFrance on occasion (post-union) prohibited all talking, even in circumstances where she required a coworker to bring her a needed item for the operation of a machine. Before the Union, Czerniawski said that employees could talk about nonwork topics such as weekend happenings, cars, kids, and vacations. According to Czerniawski, management was certainly aware of these conversations because some of the nonwork conversations included the managers themselves. Czerniawski added that she had never been disciplined for talking either before or after the Union began its campaign.

[64] See Jt. Exh. 3, a copy of Yakes' March 31, 2005 discipline. This discipline is also charged as a separate violation of Sec. 8(a)(3) in the complaint.

Trowbridge stated that by her estimate, around mid-April 2005 (possibly the first week of April), a no-talking rule was imposed on the workers. According to Trowbridge, the no-talking rule allowed conversation only, as she put it "about the machine" if you were working a two-person machine; however, you could not talk to anyone operating a machine on either side of your machine. Trowbridge said that before the Union, the employees were allowed to talk to each other while working and she herself talked about matters such as her weekend activities. She recalled that after the union campaign, AuFrance came by her machine and instructed that there was to be no chit-chat at the machine, that she was only to do her job.

Trowbridge, however, acknowledged that management did not really allow employees to talk "about [just] anything" even before the Union, but afterwards they were not even allowed to speak to other employees. According to Trowbridge, to her, the change in the talking rule redounded to a policy of "do your job, any questions, ask management." Trowbridge said that she saw managers enforce the new rule against two female workers who were separated for talking instead of working.

Davis also testified that prior to the Union, the employees talked to each other about just any topic, including family life. According to Davis, employees performed their jobs, yet still were allowed to converse with one and the other. According to Davis, management knew that they talked as on occasion the first-shift foreman (Stockman) and AuFrance would visit and converse with the workers.

Davis was not aware of any employees being disciplined for talking before the union campaign and, in fact, was not aware of any one ever being told not to talk before the union campaign.

Bradley Bakke[65] testified that as far as he was concerned, before the union campaign there was no rule against the employees' talking with one another about nonwork-related matters while working. Bakke stated that on many occasions and in at many places around the facility he saw employees talk to each other, and he himself participated in nonwork-related conversations. Bakke said that even the company foremen would engage in nonwork-related conversations. Bakke noted in that regard that he and his foreman, Ron Brooks, often talked not only about video games (Xbox and Play Station), as they were both fans of video gaming, but other topics as well. Bakke could only recall two instances in 2004 and another in 2005 when he had been advised by Brooks not to talk to an employee or be fired. According to Bakke, Brooks told him on those occasions not to talk to two employees, Amy and Tiffany, but Brooks would only say that Terri Britt had instructed him to pass this message along but had not given him any reason.[66] Aside from these two instances, Bakke said that he had never been told it was impermissible to talk in general to other workers before the union campaign.

The Respondent called Wendland to testify about the Company's rules and policy on employee conversations. Wendland noted that the employee handbook (Jt. Exh. 1), which she states was in force and existence before the union campaign, covers the matter of employees'

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[65] As noted, Bakke is a Charging Party in this matter. He was employed by the Company as a materials handler from about June 21, 2004, until April 13, 2005, when he voluntarily terminated his employment. Bakke is involved in a number of other unfair practice allegations partly involving conversations with fellow workers. These will be discussed later herein.

[66] Bakke did not indicate or suggest that the Union's presence was in any way involved with the instruction not to talk to the two women.

conversations at the facility. First, according to Wendland, under the heading Group II offenses of the handbook, employees may not engage in "personal work of any kind done on company premises without permission" (at p. 10). Second, she stated that the Company's solicitation and distribution rule prohibited employees from engaging in oral or written solicitations for any cause or any purpose during working time (at page 11), and that working time is clearly defined to preclude talking by both the soliciting employee and the worker being solicited other than at meal periods and paid breaktime in nonwork areas defined as the lunch area, parking lot, or public sidewalks.

Wendland noted that the Group I offense covering carelessness or inattention to job duties (at p. 9) could also be invoked to supplement the Company's no-talking rule. Wendland also pointed out that according to the handbook, these rules were not meant to be an exhaustive list of proscriptions relative to employee conversations. Wendland volunteered that conversations during worktime can affect (interfere with) worker productivity and emphasized that these rules have been in place before the Union.

According to Wendland, the historical practice of managers, when employees were seen for the first time talking, was merely tell them to get back to work and/or make a written note of the incident, time permitting. Wendland acknowledged that this is not always done. Wendland stated that this policy has been in effect since she has worked at Mold Masters and was not established or promulgated because of the Union.

Britt testified that during her 18 plus years with the Company, the employees have not been allowed to engage in nonwork-related conversations, mainly because of the negative effect on productivity. She related that, as a practical matter, employees observed talking about nonwork matters are basically told to shut up and get back to work by their supervisor. Britt stated that in point of fact, this has been her practice as a supervisor in the flocking department. Britt noted, however, that reprimands for violations of the rule are usually verbal and not always recorded in writing. Britt asserted that this policy has been in place during her entire tenure, has never changed and, more importantly, was not put in place in reaction to the Union.

Angela Swiatkowski, vice president of finance, stated that while the handbook sets out the pertinent written rules regarding when employees may talk on the job, the Company, as a matter of operational policy, has never permitted employees to engage in nonwork-related conversations during working time. According to Swiatkowski, when employees are observed conversing, the normal procedure is for the supervisor to tell the employee to get back to work and the employee usually complies, making a written record unnecessary. Swiatkowski stated this policy has been in place since the Company was started by her father, Hugo Leonardi.

Swiatkowski recalled the March 31 disciplinary meeting with Yakes. Swiatkowski said that an employee complained to management that she was being approached by employees out on the shop floor and harassed by them. The employee in question identified Yakes as one of the employees who was approaching her during work hours. Swiatkowski said that management (presumably herself) asked Wendland to call Yakes in and inform her of the complaint and get her side of the matter.

According to Swiatkowski, Yakes admitted that she had been talking to employees about nonwork-related matters on company time. Swiatkowski said that Yakes was very apologetic for whatever was going on in the shop floor. Swiatkowski said that she told Yakes that she did not care what the conversation was about but, if it were not about work, it could not be done on the shop floor. Swiatkowski said that Yakes made no response to her comment. Swiatkowski acknowledged that Yakes ultimately was issued the written warning with which Yakes agreed

and signed off on. Swiatkowski noted that the topic of the Union did not come up in that meeting.

Leonardi testified about the Company's no-talking policy. Leonardi stated that he was fully aware of the work rules of his Company regarding employee conversations. Leonardi said that employees "can talk all they want from they [sic] doing their job, and normally some guys [supervisors] goes [sic] up to them and breaks it [talking] up." (Tr. 452.) Asked by Respondent's counsel whether employees are allowed to have personal conversations that take them from their work, Leonardi stated that "unless it goes a long time, most of the time nobody says anything." (Tr. 452.)

Yakes, as noted, said that she was recalled to Wendland's office later on March 31 and there told that she was being written up for violating the solicitation and distribution policy by "approaching other employees to initiate non work related conversation during work hours and warned that repeated violations would result in a disciplinary suspension." At that time Yakes said that she understood and would comply with the policy.

Yakes said that she then asked Wendland about rumors Yakes had heard about herself, and whether she should let Wendland know of them. According to Yakes, Wendland said that it was Yakes' decision to do that. Yakes said she then said to Wendland, "I'm sure you heard of the meeting[67] we had on Monday," at which point Wendland stopped and asked if she could have another person participate in the meeting. Yakes said that she did not mind and Swiatkowski joined the meeting. Yakes said that upon Swiatkowski's entrance, she got sidetracked and did not discuss further the Easter Monday meeting. Yakes said, however, that she told the two managers that she had heard rumors that Leonardi was upset with her because he thought that it was she who called in the Union. Yakes said that she did not want management to think she would do anything to hurt the Company.

According to Yakes, Swiatkowski said that she was not legally allowed to talk about anything that was going on, but that the Company had to protect itself, that management was essentially trying to keep the Company going.[68]

Parenthetically, Yakes said that on April 1, the day after being written up, Leonardi approached her while she was working at her machine and said, What is this b---s--- I hear about your thinking that I am mad at you." Yakes said she told Leonardi that she had heard that he thought that she had started all the trouble at the facility, but she would not do anything to hurt the Company. According to Yakes, Leonardi said that he was not concerned about all the stuff going on. Rather, he was concerned about keeping the business going; that the employees did not realize how expensive it was to run a business. Yakes said that she and Leonardi were alone at the time of the conversation. Yakes noted that she never told management or her coworkers that she had called the Union because she feared that she would be terminated.

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[67] It is worth noting that Leonardi testified that he was told about this meeting by "some people." (Tr. 457.) He denied deliberately driving by any employee meeting. He said that he was not aware of doing this although he said it was not unusual for him and Britt to drive together during nonwork hours.

[68] Yakes stated that Swiatkowski in this conversation basically said that she did not want to talk about the Union because of her concerns about legal issues, but that she needed people to be working during worktime. Swiatkowski also mentioned her concerns about the Collins and Aikman pull-out.

Wendland explained why she issued Yakes a written discipline for engaging in nonwork-related conversations on March 31. Wendland said that another worker, Christine Chase, complained to Leonardi that someone was interfering with her work by engaging in disruptive nonwork-related talk. Wendland said that Swiatkowski communicated this complaint to her but Wendland had no idea that conversation was about the Union. Wendland stated that she did not ask Yakes anything about the Union in this meeting because it did not matter to her what the topic of conversation was for purposes of enforcing the solicitation and distribution policy.

However, Wendland conceded that even if she did not actually know, she at the least had an idea that Yakes' conversation had something to do with the Union. Wendland also conceded that the only documented (written) instances of the Company's having issued—disciplines for violation of the solicitation-distribution policy—were for Yakes and Bakke.

Regarding the complaint against Yakes, Swiatkowski testified that the complaining employee did not indicate about what specifically she was being harassed and Swiatkowski did not ask; she conceded that the extent of her investigation was to call Yakes in to hear her side of the story. Basically, Swiatkowski said that she felt no further investigation of the complaint was necessary since the complaint charged Yakes with allegedly stopping her from doing her work because of nonwork-related discussions. Swiatkowski intimated to Yakes that her concern was the cessation of the practice.[69]

The General Counsel essentially argues that as of the March 31, through Wendland and Swiatkowski, the Respondent violated Section 8(a)(1) of the Act by effectively promulgating a general rule against talking about the Union in the facility. She contends that although the Respondent's managers testified that the no-talking rule existed prior to the Union's campaign, the rule was not uniformly or consistently enforced because employees were previously allowed by supervisors to engage in all manner of nonwork-related conversations during worktime, and these self-same supervisors themselves sometimes joined them in the exchanges on the floor. The General Counsel essentially submits that the timing of the announcement and promulgation of the rule coincides with not only the Union's organizing effort but also the concerted activities of the employees who had met mere days before as a group to discuss working conditions at the facility. The newly enforced rule, she asserts, was simply designed to be a coercive countermeasure to employees' efforts to improve their working conditions with or without union representation.

The General Counsel also contends that the Respondent violated Section 8(a)(3) by disciplining Yakes on March 31 because the discipline was clearly based on the Company's suspicions of Yakes' union activities, as well as its knowledge of her involvement with the employee meeting she not only attended but also organized. The General Counsel contends that the Respondent's witnesses, especially Wendland, were not credible. She notes that Wendland changed her testimony about the subject matter of the meeting with Yakes once she was confronted with her own notes of this meeting. Additionally, Swiatkowski admitted that her (and presumably Wendland's) investigation of the matter went only as far as Yakes and she evidently did not inquire of employee Chase what was the nature of the so-called harassment

[69] I note that Swiatkowski, on cross-examination, stated that "basically what the [complaining] employee said was that *people* were talking to her while she was trying to do her job and she wanted *them* to stop." (Tr. 340.) Thus, it seems that Yakes may not have been the only person interfering with the complaining employee, but Swiatkowski's investigation evidently began and ended with Yakes.

that Yakes was committing. Notably also, she argues, is the failure of the Respondent to call Chase as a witness. All in all, the General Counsel submits that the reasons put forth by the Respondent for Yakes' discipline are mere pretexts for its illegal action,[70] and that the Respondent has failed in meeting its burden to show that it would have disciplined Yakes irrespective of her union or other protected activity.

The Respondent contends that, essentially, Yakes admitted that she violated the no-talking policy of which she was fully aware at the time, having been verbally warned about talking excessively on company time prior to March 2005. Accordingly, the Respondent submits that this fact, coupled with the fact that neither her union or other protected activity was brought up by the participants, confers the March 31 discipline with legitimacy.

The Respondent asserts that all employees, including Yakes, knew prior to the Union of the Company's rule against nonwork-related conversations, and that even Yakes admitted that the Company had previously enforced the no-talking rule, that she had been disciplined for talking during worktime prior to March 2005. Contrary to the General Counsel, the Respondent submits that the rule has been and was enforced prior to the union campaign, that no change took place in response or reaction to the Union's presence or because of the protected activities of any employees. Specifically, the Respondent asserts that Yakes was disciplined because she had confessed to engaging in nonwork-related conversations, contrary to a rule of which she was clearly aware. Accordingly, the Respondent submits that the writeup was appropriately and, more to the point, legally issued to Yakes.

Based on the credible testimony of the employees (former and present), it seems abundantly clear to me that irrespective, perhaps even in spite of the prior existence of the Respondent's no-solicitation rule, employees customarily and with the apparent knowledge (and participation) of supervisors engaged in nonwork-related conversations. I note that even Leonardi acknowledged that his employees were allowed to talk among themselves as long as this was not excessive. He made no distinction between work and nonwork-related conversation, so I presume that, basically, the Company's supervisors essentially followed the 5-minutes-is-excessive rule of thumb in enforcing the solicitation policy.

I would find and conclude that around March 31, in the aftermath of the Respondent's (principally Leonardi's) discovery that the molding workers had met in the park, coupled with its (and his) suspicions that Yakes was now working on behalf of the Union, and specifically talking to the employees about work conditions, the Respondent embarked upon a ratcheting-up of its enforcement of the no-solicitation rule.[71] I would find and conclude that this action was undertaken to thwart the union drive and employee efforts in support thereof, and to interfere with its employees' efforts to engage in other concerted activities to improve their work conditions and terms of employment in violation of Section 8(a)(1).[72]

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[70] The General Counsel notes additionally that the timing of the discipline of Yakes is highly suspicious, coming as it did within a few days of the Easter Monday meeting. She also notes that the discipline itself is remarkable in that of all of the many disciplinary actions of record, Yakes and Bakke were the only employees ever written up for talking. In short, the pretextual nature of the Respondent's treatment of Yakes, in her view, is abundantly demonstrated.

[71] It should be noted that there is no claim or charge that the Respondent's no-solicitation/distribution rule is unlawful in and of itself.

[72] I note in passing on this aspect of the complaint that I have considered the totality of the record herein which, in my view, establishes that the enhanced enforcement of the rule was merely one of the early steps taken by the Respondent to defeat the union cause through a

Continued

Regarding Yakes' discipline on March 31, I am likewise convinced that this occurred out of the Respondent's unlawful motive and discrimination against Yakes not only for and because of her suspected union support, but also because of her union involvement with and engagement in protected activities with the molding workers.

On this latter point, I believe that the Respondent's managers knew either from plantwide scuttlebutt or Leonardi's and Britt's actually having observed Yakes at the park meeting that she was collaborating with other workers to effect change among the work force either through the Union or otherwise. I would therefore find and conclude that the Respondent's March 31 discipline was unlawful.

I am persuaded to this conclusion for essentially two core reasons. One, as noted b y the General Counsel, Yakes was one of only two employees going back to 2003, who was ever written up for violating the no-solicitation rule. The other was Bakke. Thus, her writeup on March 31 in a sense was unprecedented in terms of its severity and to me was a clear departure from the Company's stated practice of enforcing the rule. Of course, on this record, at no other time was there any ongoing union campaign and/or employee meetings taking place. Two, it is significant to me that the Respondent's investigation of Yakes' purported violation, in my view, was highly inadequate.

Assuming (but not finding) the accuracy of Swiatkowski's report of employee Chase's complaint, I note that the complaint referred to people (plural) essentially interrupting (Chase's) work with nonwork-related conversations. Since Chase did not testify, one does not know whether she was speaking solely of one person—in popular vernacular some persons employ the term "people" to connote one person—or more than one as the term ordinarily connotes. However, be that as it may, Swiatkowski did not interview Chase to determine what she meant and, moreover, whether Chase herself had been engaging in prohibited conversation in her own right. On this score, it is entirely possible that Chase as well as other people, including Yakes, may have been engaged in other nonwork-related chatter and the conversation turned to a topic about which Chase had strong feelings, causing her to complain against the "people" with whom she was conversing. Other scenarios are possible, but the Respondent decided that the "people" was Yakes and that she was the offending party and that was that. In my view, the Respondent's actions hardly bespeak a fair and full investigation of the incident for which only Yakes was written up. It seems eminently clear that Yakes was at that point in time on management's bull's eye and it was she, a suspected ringleader of the union movement, who was to be disciplined.

Accordingly, I would find and conclude that the Respondent, under these circumstances, did not meet its burden to show that it would have imposed the discipline of March 31 on Yakes irrespective of her union or other protected activity. Accordingly, I would find a violation of Section 8(a)(3).

5. The April 7 allegations

Paragraph 15 of the complaint in omnibus fashion alleges that several of the Respondent's admitted supervisors and agents on April 7, 2005, violated Section 8(a)(1) of the Act on numerous occasions within the plant facility by threatening employees with discipline for nonwork-related discussions during worktime; coercively interrogating employees; threatening

curtailment of employee discussion or other interaction.

retaliation against and discipline of an employee for not disclosing the names of employees engaging in union activity; conveying the impression to an employee that the union activities of employees were under surveillance; and threatening retaliation against employees who talked about the Union at the Company's facility.

(a) Wendland's alleged threat on April 7 to discipline Yakes for engaging in any nonwork-related discussions during worktime

Yakes stated that about a week after her March 31 writeup for talking during worktime, she was called once more to Wendland's office and there told by Wendland of another talking-while-working complaint lodged against her. Yakes said that she protested, telling Wendland that she could not recall talking with anyone about nonwork-related issues. Wendland, according to Yakes, told her that Leonardi himself had seen her talking to someone. Yakes said that she asked Wendland to consult with Leonardi to provide her with more in the way of specifics; Wendland complied and brought Leonardi to the meeting.

According to Yakes, Leonardi informed her that he had seen her talking with employee Bradley Bakke in the aisle of the facility one day while Bakke was operating the hi-lo. Yakes said that she explained to Leonardi that she spoke to Bakke about the need to clean a machine. Parenthetically, Yakes said that by April 7, she (and other employees) was not allowed by management to leave her machine and had asked Bakke to get someone to service the machine. Yakes recalled the conversation as having occurred on April 5. Even given her explanation, Yakes said that Leonardi still seemed very upset and said "you people are talking about the f---ing union and I am going to put a stop to it." Yakes said she persisted and tried to explain the situation to Leonardi but Leonardi simply walked out of the room. Wendland said that she would investigate the incident, and the meeting ended.

Yakes said that later that day, she was again called to Wendland's office where Wendland said that Yakes' version of the encounter with Bakke had been corroborated. However, while Wendland did not write her up, Yakes said that Wendland warned her that any repeated infractions on her part would result in discipline. The next day (April 8), while working, Yakes said that Leonardi apologized to her.[73]

The Respondent called Wendland to testify about this incident.

Wendland acknowledged that she spoke to Yakes about on-the-job talking on April 7 because Leonardi had brought the matter to her attention based on his observation of Yakes talking with another employee, Bakke, during working time.[74] She noted that Yakes had just been written up for a similar offense on March 31. Wendland also acknowledged that Yakes told her that the conversation with Bakke was work-related.

According to Wendland, Leonardi was asked to join the meeting with Yakes because Yakes wanted some additional proof of the charge against her and asked to speak with him. Wendland acknowledged that Leonardi spoke to Yakes who told him her version of the encounter with Bakke. However, Wendland said that Leonardi did not say he knew employees

[73] Yakes noted that in the second April 7 meeting with Wendland, as well as the April 8 meeting with Leonardi, she was alone with each person.

[74] It should be noted that this matter is the subject of a separate charge involving Bakke. Wendland said that she met with Yakes as part of the investigation of both Bakke and Yakes stemming from Leonardi's observing them talking on April 5.

were talking about the Union or that he was going to put a stop to it. Wendland stated that she ultimately told Yakes the matter was concluded but reminded her that the company policy prohibited discussion of nonwork-related topics of any kind. Wendland said that Yakes received no discipline for this matter and, moreover, was not threatened with discipline if she continued to talk about the Union. [75]

Wendland also testified that, in fact, she did not ask Yakes anything about the Union and, further, that the topic of discussion did not matter to her if the discussion was nonwork-related. Wendland, however, admitted as of March 31, she must have had an "idea" that the conversation involving Yakes had something to do with the Union.[76] Wendland also admitted that although she had made a diligent search of company records, she could only find the formal writeups for Yakes (and Bakke) for violating the solicitation and distribution policy.[77]

The General Counsel contends that Woodland unlawfully threatened Yakes with further discipline for future violations of the solicitation rule. She notes that although Yakes was not formally written up on April 7, Wendland, in anticipation of determining a violation, wrote a second and final notice which she withheld because the investigation did not bear the fruit she sought. Nonetheless, the General Counsel submits that this action (taken together with others) against Yakes by the Company was unlawfully coercive. She further argues that Wendland's testimony denying any connection between this April 7 action (and others) against Yakes and her union or other protected activities is not credible.

The Respondent counters that Wendland at this meeting, after determining that Yakes and Bakke were indeed engaged in work-related conversation, simply informed Yakes that she was not going to be disciplined and the matter was dropped. The Respondent asserts that Wendland was acting within her rights to warn Yakes about the consequences of violating the policy and that, on balance, there was nothing unlawfully coercive in Wendland's action.

I would find and conclude that the Respondent did not violate Section 8(a)(1) with respect to the warning issued to Yakes on April 7 by Wendland.

Irrespective of my previous finding of the Respondent's interference with Yakes' Section 7 rights on March 31, it seems that the Respondent, on April 7, was enforcing the existing no-talking rule (the validity of which is not disputed) in a way that seems consistent with its practice before the Union arrived. Leonardi, whose testimony I would credit here, basically observed two employees talking (in his view excessively) and made an issue of it. Wendland, acting on his

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[75] Wendland, on cross-examination, admitted that she had written up Yakes in advance for the incident on April 7 and would have imposed a 3-day suspension on her. But this discipline was not issued. (Tr. 387–388.)

[76] Wendland initially denied that the Union was part of the discussion. However, on cross-examination by the General Counsel, Wendland identified a note that she had authored dated March 31, in which she wrote that she called Stephanie (Yakes) to her office to discuss "issues of complaint from employees that she is discussing what is going on," and in parenthesis she wrote "union." This evidently triggered Wendland's recollection about the nature of the complaints leveled against Yakes for talking on worktime. This note was not marked as an exhibit. I also note that Wendland's note speaks to people, not one person, who complained about Yakes.

[77] Notably, as the human resources manager, Wendland was the responsible custodian of the Respondent's personnel records and made the search of its files pursuant to the General Counsel's subpoena duces tecum.

instruction, investigated the matter and determined that the conversation between Bakke and Yakes was work-related. The Respondent here was entitled to enforce its legitimate policy, and Woodland's warning to Yakes that she would be disciplined for future violations—talking about nonwork-related matters—did not constitute an unlawful threat in violation of the Act. For these reasons, I would recommend dismissal of this aspect of the complaint.

(b) The alleged interrogation of Bakke regarding his knowledge of employees' union activity; the alleged threat to retaliate against Bakke if he did not reveal the names of employees engaged in union activity; the alleged conveyance to Bakke that the union activities of employees were under surveillance; and the alleged threat of discipline of Bakke if he did not provide the names of employees engaging in union activity

Bakke testified that he was employed by Mold Masters as a materials handler from June 21, 2004, through April 13, 2005, when he voluntarily terminated his employment. He worked in the flocking department, and his immediate supervisor was Ron Brooks.

Bakke stated that he became aware of the union organizing efforts around the end of March 2005, but was himself not involved in the campaign. He noted that other workers (around 5–10) engaged him in conversations off and on about the Union during the time the Union was campaigning at the facility.[78]

Bakke said that on April 5, he was approached by the flocking department manager, Terri Britt, who told him that not only had she noticed his talking too much but that Leonardi had also. Britt warned him that he had better stop or he might be fired. Bakke said he told her in response that he felt that this union business had everyone worked up. At this point, according to Bakke, Britt then asked him to see her in her office after work because she wanted him to provide the names of the employees with whom he had been talking to about the Union. Bakke said that at the time he thought she was kidding and did not take her seriously. He asked her, "Is this for real?" According to Bakke, Britt said that she was serious and repeated her request that he report to her office after work that day. Bakke said no other employees were around when this encounter took place on the plant floor.

Bakke said that he was unsure about what to do about Britt's request because having dealt with unions, he did not think her request was legal. Bakke testified that he was equally concerned about causing problems for his fellow workers and he did not want to give Britt information that might result in employees losing their jobs.

Bakke stated that during the day, he spoke to Britt when she was in the company of AuFrance and the quality control foreman, whose name he did know, and asked her if she still wanted to see him in her office after work; Britt said that she did. Bakke said that he asked her would she discuss the matter at that time. According to Bakke, Britt said that she did not want to discuss the matter right then, that she wanted to talk to him alone. Bakke said that he told Britt that he would meet with her after work as she instructed. However, because of his concerns, Bakke said that he ultimately decided not to meet with Britt and simply went home.

[78] Bakke explained that various employees asked his opinion about unions, but none said whether he or she was for or against it. They asked him how he felt about a union's coming in but no one pushed the Union. Bakke said that in these conversations he was neutral and did not advocate a position either for or against the Union.

The next day, April 6, because of the dilemma in which he found himself, Bakke said that he called in sick and did not report to work.

On April 7, Bakke said that he reported for work and was called by his supervisor (Brooks) to his office. Once there, according to Bakke, Brooks told him that he would not be operating the hi-lo but would be working on the primer (machine). Then, about 10–15 minutes later, Britt summoned him to the foreman's office where he met with her and Brooks.

At this meeting, according to Bakke, Britt said that she was very upset over his not meeting with her on April 5. Bakke said that he apologized to her, telling her that he did not think she was serious. According to Bakke, Britt said she was indeed serious about the need to know the names of employees who had been talking to him about the Union; that his not meeting with her made her look bad to her boss (Leonardi).[79]

Bakke said that he told Britt that he did not know everyone's names, to which Britt responded (emphatically) that we (management) really needed to know the names. Bakke said that Britt continued to press him for the names of the employees who were talking about the Union. Bakke said that he repeatedly told Britt that he did not know the names.

Bakke said that he eventually told Britt that he did not think her request was legal;[80] and, further, that he did not want to get anyone in trouble. Bakke said that he also told Britt that he was not supportive of the Union. According to Bakke, Britt responded that she wanted loyal employees—people who will do their job and do what the Company directs. Bakke said he told Britt that he considered himself a loyal employee and always tried to do the best job.

According to Bakke, Britt persisted, saying that she really needed to know the names of the employees and then added if we can't retaliate against them, we will retaliate against him (Bakke). Bakke said this remark was triggered by his telling Britt that he was sorry but he did not know the names.

Bakke said that he then told Britt that he would take responsibility for his actions as well that of other people, and that she could do whatever she wanted to him. Britt then said we will (do just that) and that he could go back to work on the primer.

Bakke noted that Brooks said nothing at this meeting but later (around 9 a.m.) that same day, Brooks escorted him to Wendland's office. Once there, Bakke said that Wendland told him that everything was confidential, that he should not worry about anything, that employees chit-chat and this was to be expected (by management). However, Wendland added that employees have been written up for chit-chatting while working at their machine and have been given time off.

According to Bakke, Wendland then said that it had come to her attention (from Britt) that there were people talking about the Union and that she wanted to know their names. Bakke said that he did not really directly respond to her but played it off as if he did not know their names.

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[79] Bakke was aware that Britt and Leonardi were, as he put it, girlfriend and boyfriend and seeing each other.

[80] Bakke noted that Britt told him in response to this statement that anything said on company time by any employee at any time was the Company's right to know—the Company had every right to know what was being said and who was saying it. (Tr. 231.)

According to Bakke, Wendland persisted and asked if he could (at least) physically describe them or tell her at what machines they worked. Bakke stated that he intentionally tried not to cooperate with her and, in fact, pointedly decided to say nothing helpful to Wendland; he tried to avoid answering her by saying he did not know the person involved. Bakke said that Wendland then told him that she had some leads about persons who might have been talking to him; that she would check those out and then get back with him. Bakke said this conversation ended and he again returned to the primer.

Bakke stated that he was again called back to Wendland's office after lunch that day. Brooks escorted him to the office but did not stay. According to Bakke, Wendland, appearing to him somewhat frustrated, asked him about a conversation he had had with Yakes on April 5.[81] Bakke said that he explained that the conversation in question related to Yakes' need for a molding tech to help with a machine repair. Bakke said that he did not know the techs and Yakes gave him three names. Eventually a tech, Craig Williams, assisted her. Bakke stated that his explanation seemed to satisfy Wendland who cryptically said "that explains that."

According to Bakke, Wendland then said that all of their leads regarding the identities of employees talking about the Union had fallen through and she needed the names from him. Bakke said he told Wendland that he had given the matter much thought and decided that what she was asking of him was in his view immoral, unethical, and illegal, and he was not going to participate any more, that she could do what she wanted to him.

According to Bakke, Wendland then said that someone was going to get a 3-day suspension out of this, that management wanted the names; but if we could not get them, he (Bakke) was going to get the punishment. Bakke said that he resignedly told her that he would have to take the punishment. Wendland said that she would start the paperwork and dismissed him to go back to work.

Britt testified and acknowledged that Bakke is or was employed in her department. Britt stated that she learned from Leonardi that Bakke was involved in impermissible conversations with other workers on the floor on about April 5; Leonardi asked her to speak with Bakke.[82]

Britt said she spoke to Bakke about having received a complaint about his talking to other employees. Britt noted that Bakke responded by saying that employees were stopping him and talking to him about the Union. Britt said that she told Bakke that she did not really care about what they were discussing, but that he was there to do a job and he should just to do that.

Britt admitted that she told Bakke report to her office at the end of the workday and he said that he would. Britt noted that she again saw him at around 3:15 p.m. that day and reminded him of the meeting. Although she emphasized to him that she was serious on this

[81] Bakke noted that on April 5, he had spoken with Yakes prior to Britt's approaching him about his talking excessively on that day.

[82] Britt said that Leonardi told her that he had observed Bakke talking to an employee for about 5 minutes, so he surmised the conversation could not have been work-related. Britt said that Leonardi did not identify the other employee with whom Bakke was conversing. In fact, Britt stated that at no time did she even learn the identity of this person, even including up to the hearing.

occasion as well as the first, Britt said that Bakke, nonetheless, did not report as directed and, in fact, did not even report to work the next day.

Britt said she did eventually meet with Bakke on April 7 in the flocking department office along with Bakke's supervisor, Brooks, and asked him why he did not report to her office. Britt said that Bakke told her that he thought she was joking. Britt stated that she disabused Bakke of that notion, telling him that she did not joke.

Britt said she told Bakke that the reason she wanted to see him was to determine why he was conversing with these other people and who basically was keeping him (Bakke) from doing his job as he mentioned to her on April 5. Britt stated that Bakke's attitude was nonchalant at the time.

Britt said that Bakke responded that he was not going to give her any names, so she assumed he was the one impeding the workers from doing their jobs. Britt denied saying anything to Bakke about talking about the Union. Britt defended her queries of him based on the company policy prohibiting employees from interfering with work and management's need to investigate such complaints. Britt testified that she did not care whether employees were talking about the Union and denied telling Bakke that she was going to retaliate against him or anyone else for union activity. Britt also testified that she was not "aware" of her bringing up the topic of employee loyalty during any conversation with him. Britt further denied that Bakke told her that her questions were illegal, immoral, or unethical.

After this meeting, Britt said that she spoke to Wendland on April 7 about writing Bakke up for failing to follow her orders. Because she had to leave early that day, she asked Wendland to draft the writeup and have Brooks issue it to Bakke at the end of the workday on April 7.[83]

Wendland confirmed that she learned of the situation involving Bakke from Britt on April 5, and that she convened a meeting with him on April 7, when he returned to work from sick leave to get an explanation from him for failing to meet with Britt. Wendland confirmed that Britt wanted Bakke written up for failing to obey his direct (immediate) supervisor's order.

Wendland admitted that she confronted Bakke with the issue of his talking with employees. She said that Bakke said two employees were talking with him and he was merely being polite in responding to them. Wendland said that she reminded him that employees could not talk about nonwork-related issues. Bakke said that he was aware of this policy. Wendland stated that she told Bakke that she was not concerned about the topic of his conversations with other employees.[84]

Wendland said that she also discussed the Britt matter with Bakke who said that he thought that Britt was kidding about meeting with her about 10 minutes before quitting time. Wendland testified that she did not think that Bakke then told her that Britt had asked him to identify employees talking about the Union, the reason for her request of him. Wendland stated that, in point of fact, the topic of the Union never came up. Wendland also denied asking Bakke for the names of people who were talking about the Union.

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[83] Notably, the disciplinary writeup issued to Bakke on April 7 entailed a 3-day suspension and is the subject of a separate unfair labor practice charge to be discussed later herein.

[84] Bakke admitted that Wendland said words to this effect in his initial meeting with her. (Tr. 257.)

Regarding those employees who may have been talking to Bakke, Wendland said that she told Bakke that if he wanted to tell her who was approaching him and causing him to stop doing his job, the Company would (out of consistency) speak to all of the persons involved. Wendland denied telling Bakke that the Company was going to retaliate against him or anyone else. Wendland said the meeting ended with her telling Bakke that she was going to investigate the matter further and sending him back to work.[85]

Wendland said that later in the day she called Bakke back to her office and informed him that she had determined that he and Yakes were indeed talking about a work-related matter on April 5, and that matter was concluded with no discipline being issued to him.

However, Wendland acknowledged that she then turned to Bakke's refusal to meet with Britt as instructed by her. According to Wendland, Bakke seemed very uptight and mentioned that the union business was getting ridiculous, that he did not like or want the Union, and wanted the whole business to stop. Wendland stated that Bakke's remarks were to her more in the way of an outburst and she did not address his comments except again to say that no matter what the employees were talking about, conversations should not be on company time. Wendland maintained that she never asked Bakke who was talking to him about the Union. Wendland stated that ultimately she prepared a disciplinary writeup for Bakke for not following Britt's order.[86]

Ronald Brooks testified that he was a supervisor in the flocking department and had been employed by the Company for about 5 years. Brooks stated that he learned of an issue involving Bakke's alleged conversation with other employees around April 5 from Britt, his boss. Brooks said that Britt also told him that Bakke had left work (on April 5); that she was upset about this. Britt directed him to have Bakke see her the next morning. However, Brooks stated that Bakke did not report for work on April 6.

When Bakke reported to work on April 7, Brooks said that he escorted him to a meeting with Britt who asked Bakke why he left work on April 5 without her. Brooks confirmed that Bakke said that he did not think that she was serious; he also confirmed that Britt said that she was very serious.

Brooks recalled that Britt asked Bakke who was bothering him and keeping him from doing his job. Brooks recalled that Bakke said he did not want to reveal the names. Brooks could not recall Bakke's saying anything else about talking with other employees.

Brooks said that the Union never came up as a topic in this meeting; that Britt never said that she would retaliate against Bakke or anyone for any union activity; nor did she ask him who was talking about the Union.[87] Brooks testified that he could not recall whether Britt said

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[85] As previously discussed, it was at this juncture that Wendland, as part of her investigation, called Yakes in to discuss Leonardi's having observed her and Bakke talking in the aisle. It is noteworthy that if Wendland is to be believed, she felt that a proper investigation of a complaint against one employee by other employees at least entailed interviewing all parties. Of course, as noted, Yakes was not accorded this consideration on March 31.

[86] Wendland identified Jt. Exh. 2 as the writeup for Bakke, which imposed a 3-day unpaid suspension on him for refusing to obey orders of his direct supervisor.

[87] Brooks said that he was aware of the ongoing union campaign and that it was being talked about. However, Brooks could not recall if the campaign was going on around April 7,

Continued

anything about (employee) loyalty or the Company's desire to have loyal employees. The meeting ended and later that day Brooks said that he issued Bakke a suspension notice. Brooks stated that he memorialized the discipline of Bakke with a note to himself.[88]

(c) The 3-day suspension of Bakke on April 7

The complaint alleges that Brooks' issuance of the previously discussed 3-day suspension to Bakke on April 7 was violative of Section 8(a)(3) of the Act.

Bakke testified that after meeting with Wendland earlier on April 7, Brooks issued a 3-day suspension to him for refusing to obey (Britt's) orders and informing him that his next violation would result in his being terminated.

Bakke said that he went to see Brooks in his office to seek clarification of the reason for the writeup, that is, whether it was issued for not giving the names of employees involved with the Union or for something else. According to Bakke, Brooks thereupon left the office to check with the front office and, upon his return, gave him the writeup and told him that the writeup was for something else other than naming employees talking about the Union; however, Brooks said he did not know what the "something else" was.

Bakke admitted that he signed the writeup but wrote in the employee remarks part, "I refused to give the names of individuals making remarks about the UAW Union." Bakke said that his concern was that management would come back and give him another writeup for the same offense. Bakke said that he returned the signed writeup to Brooks who simply looked at it and shook his head.

Bakke said that he served the 3-day suspension on April 8, 11, and 12, and returned to work on April 13. On April 13, however, Brooks presented him with another writeup for bad parts, but Brooks could not tell him how or why the parts were bad other than that the parts were scratched. Bakke said that he served this suspension also, but decided there was no point under the circumstances in returning to Mold Masters. Bakke stated that he voluntarily terminated his employment on April 13, his last day of work.

As previously discussed, Brooks admitted his part in the issuance of the April 7 suspension. However, Brooks said that he never told Bakke any reason for the discipline other than what was contained in the writeup itself. Parenthetically, Brooks stated that he never heard of any effort by the Company to retaliate against anyone for involvement with the Union and especially with respect to Yakes or Bakke.

Regarding the Bakke allegations, the General Counsel first submits that by the time the Respondent's managers approached Bakke initially on April 5, it had already engaged in a steady course of discriminatory and coercive conduct towards its employees, Yakes in particular but other employees as well.

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because he was not involved in the campaign and made no effort to become involved.

[88] See R. Exh. 14. In this note, among other things, Brooks noted that Bakke said that he did not think Britt was serious in her request to report to her after work on April 5. He noted that Britt said "this makes me look bad" to her boss to which Bakke responded, "Yeah right." Also, according to the note, Britt asked Bakke for the names of employees he said were harassing him and Bakke replied that he did not want to get involved.

She asserts essentially that by April 5, the Respondent, its union animus in full flower, began in earnest to seek information about other employees who were involved with the Union in order to discipline them. Thus, she argues Leonardi, upon observing Bakke conversing with a suspected ringleader of the movement—Yakes—launched a series of coercive and threatening encounters with Bakke which ultimately led to his unlawfully being suspended because of his refusal to cooperate with management's request for names of union sympathizers.

The General Counsel further contends that Bakke's interrogation by Britt, his supervisor, Brooks, and Human Resources Manager Wendland were instigated from the top by Leonardi, who had observed Bakke and Yakes conversing in the first place. Because Bakke refused to cooperate, he was then threatened with retaliation by management and a specific discipline—a 3-day suspension—on April 7. Because Bakke persisted in his refusal to cooperate with management's threats, he ultimately was issued a 3-day suspension on April 7, ostensibly for refusing to follow Britt's orders. The General Counsel contends that the real reason for the suspension was his refusal to provide names of the union sympathizers. Accordingly, she argues that the interrogations, the threats, or retaliation, Wendland's statement that management knew the identities of employees supportive of the Union, and his unlawful suspension reasonably conveyed to Bakke that activities of his fellow employees were under surveillance by management. In sum, the General Counsel submits that Respondent violated Section 8(a)(1) and (3) of the Act in its treatment of Bakke on April 7, 2005.

Evidently conceding that the entire series of events involving Bakke and management emanated from Leonardi's observation of Bakke and, as it turned out, Yakes conversing (in Leonardi's view b---s---g instead of working) in the aisles, the Respondent argues that, nonetheless, nothing unlawful transpired in the Respondent's treatment of him.

The Respondent submits that Britt, in essence, merely informed Bakke of Leonardi's complaint and that Bakke himself told her that other employees were approaching him and talking about the Union. Britt thereupon asked him to report to her later that day to talk about the matter. The Respondent avers that at the meeting, with Brooks in attendance, Britt merely asked why he did not report to her as instructed and who was interfering with his doing his job—her sole concern and unconnected to the Union or its campaign. The Respondent notes that its managers involved in the encounter, Britt and later Wendland, decided that Bakke's failure to report to Britt as instructed was actionable. Wendland met with him to get his side. In the course of this meeting, again the inquiry, this time from Wendland, was to determine who was interfering with Bakke's performance of his job; but there was no threat of retaliation against him or other workers. The Respondent submits that after the matter with Yakes was cleared up, Bakke's failure to report was still of moment. Wendland ultimately and legitimately issued the suspension based on Britt's recommendation. Denying any connection of Bakke's discipline with the Union, the Respondent submits that it was Bakke himself who brought up the Union in the course of the Company's investigation of what it viewed as an impermissible interference with Bakke's job. The Respondent further submits that insubordination is an actionable offense calling for serious discipline according to the handbook and that the Company has imposed suspensions for this reason on other employees in the past. Thus, Bakke was treated in accordance with company policy and past practice.

The Respondent also submits that Bakke was not a credible witness as evidenced by his contradictory testimony regarding his failure to report for work on April 6. On balance, the Respondent asserts that his testimony was replete with extreme but implausible claims and should be rejected.

The resolution of the Bakke allegations depend largely, if not wholly, on credibility as is often the case. Bakke's testimony, if believed, surely point to violations of the Act in my view, specifically Section 8(a)(1) and (3) by the Respondent.

Here, the Respondent's witnesses essentially deny any connection of the Company's treatment of Bakke to his union activity or his association with anyone who was so associated or thought to be. Bakke testified that what essentially happened to him was threatening encounters with his supervisors, who were desperate to know the names of union supporters and suspended him because he refused to cooperate with them. While not charged in the complaint, Bakke testified basically that he quit his employment because it was clear to him that he was going to be harassed by trumped-up violations if he did not give the names as requested.

I observed Bakke throughout the hearing and listened intently to his version of the events in question. He answered all questions posed by the Respondent as well as the General Counsel with equanimity and calmly. He admitted that he was not truthful with management about not coming to work on April 6, but he explained that he was essentially on the horns of a dilemma and, as I see things, placed there by Britt's unlawful demand. In short, I found him to be an eminently credible witness. Significantly, his version of the events mirrors that of the Respondent's witnesses minus the inculpatory references to the Union. For example, Bakke said that he was asked by Britt to provide names of employees talking to him about the Union. Britt said that she asked for the names of those keeping Bakke from doing his job as he purportedly complained to her. In other respects, Bakke's testimony is consistent with that of three witnesses aligned against him, except again for the reference to the Union.

I note also that prior to the April 5 and 7 run-ins with management, Bakke had not ever been disciplined by management and evidently enjoyed a good working relationship with his immediate supervisor, Brooks, with whom he shared an avid interest in video gaming. Yet, after Leonardi observed him conversing with suspected union ringleader Yakes, Bakke suddenly was subject to interrogations, threats of retaliatory discipline, and ultimately a suspension by management. In the end, Bakke, evidently a dutiful employee, was moved to quit his job in face of management's behavior. Bakke's actions, taken together with his testimony, persuade me that he was truthful at the hearing.[89]

By contrast, the Respondent's witnesses, taking the totality of their collective behavior and treatment of both Yakes and Bakke—again the only two employees ever written up for talking on the job—did not come across credibly. Britt obviously was acting on behalf of Leonardi to get the names of union supporters and, in my view, took an unnecessarily aggressive approach with Bakke, whom it seems clear she knew was uncomfortable at least with her queries of him and her demands to see him after work alone.

Wendland, I believe, was also following orders from Leonardi and, like Britt, took an aggressive stance with respect to Bakke's refusal to provide names. It bears repeating that the original infraction by Bakke related to his supposedly engaging in excessive talking with Yakes about nonwork-related topics. From that purported infraction of which he was vindicated, Bakke was then interrogated and ultimately suspended. It seems that under normal circumstances under the Respondent's disciplinary scheme, he would have been given a warning or some other lesser discipline. Wendland, however, endorsed the rather draconian punishment of

[89] I note that I am further persuaded to Bakke's truthfulness by his noting on his suspension writeup the reference to his not providing names of union supporters.

suspension. Brooks, as I observed him, seemed to be a reluctant and hesitant witness against Bakke and frankly appeared as one who did not want any involvement in the fray.[90] I believe his testimony was perfunctory, lacking in detail, and basically given to support and protect his supervisors.

Based on my credibility of Bakke's testimony and other pertinent evidence of record, I would find and conclude that the Respondent violated Section 8(a)(1) of the Act by threatening to retaliate against and discipline Bakke if he did not reveal the names of employees engaged in union activities. I would also find and conclude that the Respondent violated Section 8(a)(3) of the Act by suspending Bakke on April 7.[91]

Turning to the complaint allegation that the Respondent conveyed to Bakke that his union activities were under surveillance, I would find and conclude that this charge has not been established. Notably, the Respondent's actions against Bakke commenced with Leonardi's observation of his and Yakes' conversation; all that followed stemmed from that. Therefore, Bakke, who admitted that he was talking to Yakes but about a work-related topic, openly on the plant floor could not reasonably believe that his activities, such as they were, were the subject of a company surveillance effort, that management was skulking about, peeking over his shoulder to ascertain what he and other employees have been discussing. I would recommend dismissal of this aspect of the complaint.

6. The Leonardi threats

(a) Leonardi's alleged threat of retaliation on April 7

As previously discussed herein, Yakes testified that on April 7 in Wendland's office, Leonardi told her "that you people are talking about the f--king union, and I am going to put a stop to it." According to Yakes at the time, Leonardi was very upset. Yakes stated that on April 8, Leonardi apologized for mistakenly accusing her of talking about the Union with Bakke and explained that he could not trust anyone like he used to with all the stuff going on.

Leonardi testified and confirmed that he was called into a meeting in Wendland's office on April 7 and that Yakes was there with Wendland. Leonardi recalled that Yakes was being reprimanded for talking during work hours and that, in fact, the reprimand was based on his observation of Yakes and Bakke's conversing with one another on April 5. Leonardi admitted that he was angry with them for what he thought was their standing around talking instead of working.

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[90] On this score, I found Brook's testimony, in which he said he could not recall if the union campaign was going on around April 7, highly incredible. The campaign was clearly a major event at the plant and Brook's testimony underscores, in my mind, that his testimony about Bakke was less than sincere, hesitant, and unconvincing.

[91] I have applied the *Wright Line* analysis in so concluding. Clearly, to me, because of the nature of the credible testimony, counsel for the General Counsel has met her initial burden. Furthermore, based on the credible testimony, I have determined that the Respondent's reasons for Bakke's suspension in my view are on the one hand pretextual, and on the other hand legally insufficient to persuade me that the Company would have under the circumstance suspended him for insubordination absent his suspected involvement with union supporters and/or his failure to provide names of union supporters.

Leonardi said that on April 5, he saw Yakes and Bakke standing in the middle of the aisle as he made his rounds of the plant on his golf cart. When he returned from the other end of the shop, he observed that the two were still talking. Leonardi said that he then went to the supervisor and told him that he wanted this behavior stopped. Leonardi said that he understood that the supervisor had already talked to Bakke twice that day.[92]

Leonardi said that he told the supervisor if he could not take care of the matter, he would contact his supervisor who would handle the matter.[93] Leonardi said that he ultimately told Britt about the hi-lo driver "bull---ing instead of working." Leonardi said that his anger was directed at their standing around talking in the middle of the aisle, not what they might have been talking about. Leonardi denied any knowledge of what Yakes and Bakke were talking about at this time and specifically denied telling Yakes that he knew she (and Bakke) was talking about the Union. Regarding the meeting at which Yakes was being reprimanded, Leonardi said he told Yakes that he did not care what they were talking about but they were getting paid to work and while working, that is all they had to do.

Leonardi was asked by the Respondent's counsel about his possibly making a reference to things getting out of hand, Leonardi said in response as follows,

> I might have said that in the sense that there was too many people-- Like I said, we were in a stressful situation. Too many were just conversing back and forth. And what we trying to do is we trying to alleviate the problem we had, it had nothing to do with the union. That's with the [Collins and Aikman] work leaving. (Tr. 455.)

Leonardi denied telling Yakes at any time that he wanted to put a stop to people talking about the Union and never told any employee that he was going to target, punish, or discipline Yakes for her union activity.[94]

Leonardi admitted that he later apologized to Yakes for reprimanding her when the investigation of the April 5 incident disclosed that she and Bakke were engaged in work-related conversation.

(b) Leonardi's alleged April 8 threat of not trusting the employees because of their union activities

In paragraph 16 of the complaint, Leonardi is essentially charged with threatening his employees on April 8 by saying that he could not trust them because of their support of the Union.

As previously discussed, Yakes stated that on April 8, Leonardi apologized to her for wrongly accusing her of engaging in nonwork-related conversation on April 5. According to

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[92] Leonardi did not elaborate on how he determined this.

[93] While Leonardi did not identify the first supervisor by name, it seems clear he was speaking of Brooks.

[94] Leonardi said that he did not know at the time and, in fact, up to the time of the hearing, still did not know who started the union organizing activity at his Company. (Tr. 457.) It should be noted that Wendland also testified that Leonardi did not tell Yakes at the April 7 meeting that he knew the employees were talking about the Union or that he said he was going to put a stop to it.

Yakes, Leonardi came over to where she was working (replacing some parts) and, in the course of apologizing for his mistake, said that with all the stuff going on he could not trust anyone like he used to.

Yakes said that Leonardi also went on to relate to Yakes a threatening communication he had received the day before. Yakes said that she knew that the police had been called for something but did not know the reason. She later heard that someone had written on a desk "watch your back." As previously noted, Yakes stated that Leonardi did not mention the Union by name when he referred to the stuff going on. Yakes said that she thanked Leonardi for his apologies.

On direct examination, the Respondent's counsel asked Leonardi did he ever tell any of the employees that he could no longer trust them because of union involvement.[95] Leonardi's response is as follows:

> I don't think that was the way it was brought out. We were in a big stressful situation long before the union started. One of our biggest customers [Collins and Aikman] was pulling all their work, which is probably half of our business. And we notify all of the employees and everybody was so stressed. You know, they are afraid they're going to lose their job. I don't know how I'm going to survive the business to replace half the business. So everybody was a little bit stressed. And I might have made a comment when people were standing around or talking, not working. I might have made a comment. I don't know if I did or not. (Tr. 452–453.)

The General Counsel contends that Leonardi's comments to Yakes on April 7—"you people are talking f---ing union and I'm going to put a stop to it"—were patently unlawful inasmuch as he was in so many words telling Yakes she could not informally talk about the Union and he was going to make sure she and the other employees discontinued their conversations through a threat of unspecified reprisals against her and them. The General Counsel submits that with these comments, Leonardi (and Wendland) interfered with possibly the most essential of employee Section 7 rights—the right to communicate among themselves about their choice of representatives—in this case, the Union and/or themselves—to better their job conditions.

Regarding the April 8 allegation, counsel for the General Counsel submits that it is undisputed that Leonardi apologized to Yakes for mistakenly accusing her of violating the no-talk rule the day before. She argues that equally credible is Yakes' testimony that Leonardi as part of his apology told her that he could not trust employees because of their involvement with the Union. She submits that Leonardi's reference to the "stuff"—the union campaign—going on under the circumstances could reasonably be interpreted by Yakes to mean that Leonardi felt that employees who supported the Union were disloyal or had betrayed him. The General Counsel argues that implicit in the notion of betrayal is a threat of unspecified retaliation against employees who would support the Company's enemy—the Union.

[95] See Tr. 452. This question was preceded by a question from the Respondent's counsel asking Leonardi if he made any effort to monitor employees to see who was engaging in union activity. Leonardi responded, "No."

The Respondent counters that the General Counsel did not prove that Leonardi made the allegedly offending statement to Yakes. The Respondent notes the credible denial of both Leonardi and Wendland.

The Respondent further notes that the meeting with Yakes concerned employee discussions during worktime and that if, assuming arguendo, Leonardi did state he was going to stop employees from discussing the Union pursuant to the Company's nonsolicitation rule, he was within his right to say as much. Moreover, as a result of the conversation, Yakes was, according to the Respondent, vindicated of any wrongdoing and, in total context, the meeting and any remarks made there could not be reasonably construed to be coercive.

The Respondent concedes that Leonardi did tell Yakes he felt he could no longer trust the employees but that this statement was made in the context of a threat that he himself had received. The Respondent notes that Leonardi did not specifically mention the Union by name. Moreover, it is clear that Leonardi was speaking of threats from an unnamed employee as the "stuff going on," as opposed to any union activity. Accordingly, the Respondent argues this charge, like the April 7 allegations, is likewise without merit.

As to the April 7 and 8 incidents, I believe that Yakes credibly testified about the content of her conversations with Leonardi. It seems clear that even Leonardi, in his testimony, does not really dispute Yakes in this regard. The question is, given the circumstances, whether Leonardi's statements could be reasonably construed by Yakes, who evidently did not share his comments with other employees, to be threats of retaliation in some unspecified way for talking about the Union on April 7 and not being trustworthy (loyal) for supporting the Union on April 8.

As previously discussed, Yakes, by April 7, had been disciplined for talking about the Union in violation of company policy. On April 7, she once more was being accused, this time wrongly, of violating the policy. However, on this occasion, Leonardi exhibited more than normal hostility to her and presumably any other offending employees. Yakes could reasonably infer that Leonardi and other managers were about to launch an intensified campaign to eliminate all discussion about the Union irrespective of the policy which did permit limited conversation about nonwork-related conversation, including presumably the Union. Leonardi's apparent state of upset and his use of profanity in describing the Union certainly could underscore the Company's hostile intentions. While Leonardi apologized the next day, I do not consider this a cure for his previous remarks. The damage was done and, in fact, it seems to me that Leonardi's apology for falsely accusing Yakes did not really negate his threat to put a stop to employees' talking about the Union. I would find and conclude that Leonardi violated Section 8(a)(1) of the Act on April 7 by generally threatening employees with unspecified reprisals for talking about the Union.

Turning to April 8 when in the course of apologizing to Yakes, Leonardi said that he could not trust employees, I would find, considering the totality of circumstances, that the Respondent did not violate the Act, that neither Yakes nor any employee could reasonably conclude that Leonardi was threatening her or them with being disloyal employees for their support of the Union.

Here, Leonardi's apology has more meaning in my view because Leonardi was not hostile; rather, he was conciliatory and respectful of Yakes. Also, he took that opportunity to explain to her that he had received previously a threatening communication which necessitated a call to the police. In my view, given these circumstances, neither Yakes nor any other employees would reasonably think that Leonardi was threatening her or them with disloyalty because of their union activities. More likely, reasonable employees would understand that

Leonardi was under stress and was disappointed that an employee would send him a poison pen type of note. I would recommend dismissal of this aspect of the complaint.

Conclusions of Law

1. The Respondent, Mold Masters Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct.

(a) Informing employee Yakes that her work duties had been changed in retaliation for her protected concerted and union activities.

(b) Coercively interrogating employees regarding their knowledge of which of the Respondent's employees were engaging in protected concerted and union activities.

(c) Threatening to commence enforcement of a work rule that required employees to clock out to use the restroom in response to the union organizing campaign.

(d) Orally promulgating and maintaining a rule prohibiting employees from engaging in nonwork-related discussions during working time because of its employees' activities on behalf of the Union.

(e) Threatening employees with retaliation if they did not reveal to the Respondent the names of employees engaging in activity on behalf of the Union.

(f) Threatening employees with discipline if they did not provide the Respondent with the names of employees engaging in activity on behalf of the Union.

(g) Threatening retaliation against employees who talked about the Union at the Respondent's facility.

4. The Respondent violated Section 8(a)(3) of the Act by engaging in the following conduct.

(a) Discriminatorily changing Stephanie Yakes' regular work duties, making her unable to give breaks to other employees or work on the floor of the Respondent's facility because of her sympathies for and activities on behalf of the Union, her engaging in protected concerted activities, and to discourage employees from engaging in these activities.

(b) Discriminatorily issuing Stephanie Yakes a written warning because of her sympathies for and activities on behalf of the Union, her engaging in protected concerted activities, and to discourage employees from engaging in these activities.

(c) Discriminatorily not allowing molding department employees to work together to discourage membership in the Union and because of the employees' sympathies for and activities on behalf of the Union.

(d) Discriminatorily issuing Stephanie Yakes a 2-week suspension because of her sympathies for and activities on behalf of the Union, her engaging in protected concerted activities, and to discourage employees from engaging in these activities.

(e) Discriminatorily issuing Bradley Bakke a 3-day suspension because of his suspected sympathies for and activities on behalf of the union, his engaging in protected concerted activities, and to discourage employees from engaging in these activities.

5. The unfair labor practices of the Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not violated the Act in any other manner or respect.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily changed Stephanie Yakes' regular work duties, I shall recommend that Yakes be restored or returned to her regular work duties (as of March 23, 2005), i.e., giving breaks to other employees or working on the floor of the Respondent's facilities and, if this has been done, that the Respondent furnish sufficient proof thereof.

Having found that the Respondent discriminatorily issued Yakes a written warning (on March 31, 2005), I shall recommend that the warning be rescinded and all references thereto be expunged from the Company's records.

Having found that the Respondent discriminatorily issued Yakes a 2-week suspension, I shall recommend that suspension be rescinded and all references thereto be expunged from the Company's records and that she be made whole for any loss of earnings suffered by her as a consequence of the Respondent's conduct as found herein by payment to her of any lost wages, with interest calculated in accord with Board policy as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent discriminatorily issued Bakke a 3-day suspension, I shall recommend that suspension be rescinded and all references thereto be expunged from the Company's records and that he be made whole for any loss of earnings suffered by him as a consequence of the Respondent's conduct as found herein by payment to him of any lost wages, with interest calculated in accord with Board policy as set out above.

Having found that the Respondent discriminatorily prohibited molding department workers from working together, I shall recommend that the Respondent return these workers to their regular work assignments prior to March 29, 2005, and, if this has been done, to provide sufficient proof thereof.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[96]

ORDER

The Respondent, Mold Masters Company, Lapeer, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employee Yakes that her work duties had been changed in retaliation for her protected concerted and union activities.

(b) Coercively interrogating employees regarding their knowledge of which of the Respondent's employees were engaging in protected concerted and union activities.

(c) Threatening to commence enforcement of a work rule that required employees to clock out to use the restroom in response to the union organizing campaign.

(d) Orally promulgating and maintaining a rule prohibiting employees from engaging in nonwork-related discussions during working time because of its employees' activities on behalf of the Union.

(e) Threatening employees with retaliation if they did not reveal to the Respondent the names of employees engaging in activity on behalf of the Union.

(f) Threatening employees with discipline if they did not provide the Respondent with the names of employees engaging in activity on behalf of the Union.

(g) Threatening retaliation against employees who talk about the Union at the Respondent's facility.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, return or restore Stephanie Yakes to her regular job duties prior to March 23, 2005, including giving breaks to other employees and working on the floor of the Respondent's Lapeer, Michigan facility and, if this has been already done, provide sufficient proof thereof.

(b) Rescind the written warning issued to Stephanie Yakes on March 31, 2005, expunge all references thereto from the Company's records, and within 3 days thereafter, notify her in writing that this has been done and that this warning will not be used against her in any way.

[96] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of this Order, permit molding department employees to work together in the same fashion as they did prior to March 29, 2005, and, if this has already been done, provide sufficient proof thereof.

(d) Within 14 days from the date of this Order, rescind the unlawful suspensions of Stephanie Yakes and Bradley Bakke and remove from its records any reference to them and within 3 days thereafter, notify them in writing that this has been done and that the suspensions will not be used against them in any way.

(e) Make Stephanie Yakes and Bradley Bakke whole for any loss of earnings and other benefits they suffered as a result of the unlawful action against them in the manner set forth in the remedy section of this decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Lapeer, Michigan, copies of the attached notice marked "Appendix."[97] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 23.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

It Is Further Ordered that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 21, 2006

Earl E. Shamwell Jr.
Administrative Law Judge

[97] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

JD–15–06
Lapeer, MI

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT inform employees that their work duties had been changed in retaliation for their having engaged in protected concerted and union activities.

WE WILL NOT interrogate employees regarding their knowledge of which of our employees were engaging in protected concerted and union activities.

WE WILL NOT threaten to commence enforcement of a work rule requiring our employees to clock out to use the restroom in response to any union organizing campaign.

WE WILL NOT orally promulgate and maintain a rule prohibiting employees from engaging in nonwork-related discussions during working time because of our employees' activities on behalf of unions.

WE WILL NOT threaten our employees with retaliation if they do not reveal to us the names of our employees who are engaging in activities on behalf of unions.

WE WILL NOT threaten our employees with discipline if they do not provide us with the names of employees engaging in activities on behalf of the Union.

WE WILL NOT threaten to retaliate against our employees who talk about the Union at our Lapeer, Michigan facility.

WE WILL NOT change the regular work duties of our employees because of their having engaged in other concerted protected activities.

WE WILL NOT issue to our employees written warnings because of their union activities or their having engaged in other concerted protected activities.

WE WILL NOT prohibit our molding employees from working together to discourage their support of or involvement with unions or their engaging in other protected concerted activities.

WE WILL NOT issue suspensions to employees because of their sympathies for and activities on behalf of the union and their engaging in protected concerted activities.

WE WILL, within 14 days from the date of this Order, return or restore Stephanie Yakes to the regular job duties she performed prior to March 23, 2005, including giving breaks to other employees and working on the floor of our Lapeer, Michigan facility.

WE WILL, within 14 days from the date of this Order, permit molding department employees to work together in the same fashion as they did prior to March 29, 2005.

WE WILL, within 14 days from the date of this Order, rescind the written warning we issued to Stephanie Yakes on March 31, 2005, and remove all references thereto from our records and, within 3 days thereafter, notify her in writing that this has been done and that this warning will not be used against her in any way.

WE WILL, within 14 days from the date of this Order, rescind the suspensions of Stephanie Yakes and Bradley Bakke and remove from our records any reference to them; and within 3 days thereafter, notify them in writing that this has been done and that the said suspensions will not be used against them in any way.

WE WILL, within 14 days from the date of this Order, make Stephanie Yakes and Bradley Bakke whole for any loss of earnings and other benefits they suffered as a result of our unlawful action against them in the manner set forth in the Remedy.

MOLD MASTERS COMPANY

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Federal Building, Room 300
Detroit, Michigan 48226-2569
Hours: 8:15 a.m. to 4:45 p.m.
313-226-3200.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 313-226-3244.